Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ATLE LYGREN,

Petitioner,

v.

MIRROR IMAGE INTERNET, INC.,
XCELERA.COM, INC., ALEXANDER M. VIK,
GUSTAV VIK AND HANS MAGNUS FAJERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DELAWARE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Per, *Parfi Holding AB v. Mirror Image Internet Inc.* 966 A.2d 348, 2009 WL 189862, denying the Petitioner's motion presented in time in the Delaware Supreme Court, wherefore whether the said court in ignoring the (i) damage caused by virtue of the manner of the dismissal of underlying action; and (ii) assignments comprised per the record; by virtue thereof did infringe the property rights of the Petitioner and underlying Plaintiffs, and further or in the alternative did infringe the Petitioner's right to *due process*, both aspects contrary to the U.S. Constitution or generally, having in mind settled case precedent and the uncontroversial facts.

PARTIES TO THE PROCEEDINGS

The Petitioner *pro se* is Atle Lygren, *pro se* Movant (including per successive motions for re-argument and rehearing *en banc*) in the Court-below, namely the Delaware Supreme Court, per a motion for intervention for the purposes of substitution vis-à-vis the Plaintiffs and Plaintiff Below- Appellants, viz. an appeal in the underlying action in the Court-below.

The Respondents are Mirror Image Internet, Inc., Xcelera.Com, Inc., Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson, Respondents to the Petitioner's Motion in the Court-below and Defendants Below-Appellees viz. the aforesaid appeal.

Pro the Petitioner, Rule 29.4 of the Supreme Court Rules is inapposite in these circumstances.

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Parfi Holding AB v. Mirror Image Internet Inc.
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I. BASIS FOR JURISDICTION

The Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a). The Fourteenth Amendment to the U.S. Constitution provides, in its relevant part: *"No State shall ... deprive any person of life, liberty, or property, without due process of law..."*. U.S. Constitution amend. XIV, §1. The decision of the Delaware Supreme Court to be reviewed is dated Jan. 12, 2009.[1] Pursuant to Rule 14.5 of this Court, the Petitioner was granted an additional sixty days to file a conforming Petition, to run from May 12, 2009.

II. STATEMENT OF FACTS

A. BACKGROUND TO THE UNDERLYING ACTION

Parfi Holding AB ("Parfi") and Plenteous Corporation ("Plenteous") are minority stockholders of Mirror Image Internet, Inc. ("Mirror"), a Delaware corporation. Parfi and Plenteous are plaintiffs ("Plaintiffs") in the underlying action ("Action") before the Chancery Court of the State of Delaware ("Chancery Court"). Defendant Xcelera.com Inc. ("Xcelera"), a Cayman Islands corporation and Mirror's majority stockholder, is controlled by the Respondents, Alexander M. Vik, Gustav Vik, and Hans Magnus Fajerson, all directors of Mirror and Xcelera (collectively "Respondents" and "Defendants" as the context permits).[2]

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[1] *Parfi Holding AB v. Mirror Image Internet Inc.* 966 A.2d 348, 2009 WL 189862 (Del.Supr.2009). (A43–46). The Petitioner's applications for re–argument and rehearing *en banc* were refused by orders dated respectively January 29, 2009 and February 2, 2009. (A41–42 and A39–40 respectively). All orders were entered onto the docket on February 4, 2009. (A37).

[2] *Nota bene:* "Respondents" and "Defendants" are synonymous save to the extent stated otherwise. The Plaintiffs to the underlying Action were Parfi Holding AB, Plenteous Corp., Gunnar Gill-

By virtue of an enduring power of attorney executed in the Petitioner's favor, the Petitioner enjoys discretionary control over Plenteous.[3]

The Delaware litigation ("Action") involves allegations of breaches of fiduciary duty and misappropriation of corporate opportunity stemming from certain actions taken by Xcelera as majority stockholder, and Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson, who sat as directors of both Mirror and Xcelera. The Plaintiffs allege a scheme to unlawfully dilute their ownership interests in Mirror, which ultimately enabled the Defendants to obtain a super-majority of Mirror's stock and reap profits at the expense of the minority stockholders ("Challenged Transactions").[4]

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berg, and Grandsen, Ltd. In 1997, Mirror Image was formed as a subsidiary to Mirror Image Internet AB. Parfi Holding AB is the successor–in–interest to Mirror AB. The Plaintiffs are not the Petitioner. The Petitioner was never a party to the underlying Action.

[3] Essentially, Plenteous is an asset–holding corporate construct, incorporated in Panama pursuant to local Panamanian laws, as part of an overall wealth–preservation structure ultimately as a discretionary trust. Plenteous is authorized *inter alia* to make investments into third-party companies. The Petitioner has never been either a director or an officer of Plenteous. The Petitioner is a Norwegian national who ordinarily resides in Switzerland.

[4] Filed October 2000, with answer thereto November 2000. It is the Plaintiffs' case that that the defendants never had any intention to respect the engagements they undertook vis-à-vis Plenteous. Rather, in the months that followed the parties' execution of the Underwriting Agreement (*infra*), Xcelera and the individual Defendants engaged in four transactions that the Respondents assert violated canons of Delaware corporate law. The first three transactions involved the issuance of "watered–down" stock to Xcelera and the concomitant unfair dilution of the minority stockholders' interests in Mirror Image, including that Xcelera arranged a convertible preferred stock offering to take advantage of a pending announcement involving a significant investment in Mirror by Hewlett Packard and pre–purchase Mirror stock at a

B. THE SWEDISH ARBITRATION

Months prior to filing the Action, Plenteous and Mirror Image Internet AB ("Mirror AB") filed a demand for arbitration in Sweden asserting contractual claims against Xcelera under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("Swedish Arbitration"). The Swedish Arbitration concerned alleged breaches of a March 1999 underwriting agreement between (amongst others) Plenteous and Xcelera ("Underwriting Agreement").[5]

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bargain price. Each of these transactions amounted to a breach of the fiduciary duty owed by both the directors to the minority stockholders and the majority stockholder to the minority. The fourth transaction involved the misappropriation of a corporate opportunity by Xcelera. Specifically, in the winter of 2000, an independent corporation, Exodus Communications, Inc. ("Exodus"), expressed an interest in making a multi–million dollar investment into Mirror Image. At a time when Mirror Image was still a start–up company that had yet to achieve operational profitability and desperately needed the money to implement its ambitious business plan, Xcelera and the individual Defendants structured the transaction such that 75% of the Exodus "investment" was received directly by Xcelera, not Mirror Image. Thus, it is alleged that Xcelera usurped Mirror's corporate opportunity relating to Exodus' agreement to buy Mirror stock by arranging Exodus to pay most of the consideration directly to Xcelera.

[5] The Underwriting Agreement also created certain rights to appoint directors. At the time the Underwriting Agreement was signed, the market value of Xcelera was about US$ 20MM. In February 2000, 15% of Mirror Inc. was sold for US$ 637MM, implying a value of all of Mirror Inc. of more than $4 billion. This means that but for the dilution the combined value of the minority share was about $2 billion, forming the basis for the high damages claim per the Action. In March 2000, less than 1 year after the acquisition of the Mirror Inc. shares, the market capitalization of Xcelera peaked at over US$10 billion from US $20MM less than a year earlier and the Plaintiffs understand that it set a record for market value increase on the US stock market.

C. THE UNDERLYING ACTION (2001—2002)

While the Swedish Arbitration concerned the validity of the Underwriting Agreement, the Action focused on wrongs committed thereafter, namely the Challenged Transactions.[6] Notably, Plaintiffs did not assert claims for breach of the Underwriting Agreement in the Action. Further, the Swedish Arbitration was limited to liability only. On September 26, 2001, the Swedish Arbitration tribunal ("Tribunal") ruled in Plenteous' favor, declaring the Underwriting Agreement between Plenteous and Xcelera invalid ("Arbitral Award").[7] The Tribunal did not determine the amount of Plenteous' damages. Instead, a *new* arbitration would be needed, with a *new* arbitration panel appointed ("Damages Phase").[8] In February 2001, several months before the Arbitral Award, the Defendants moved in the Chancery Court to dismiss the Action, arguing *inter alia* that the Plaintiffs were required to arbitrate their fiduciary duty claims in Sweden as well. The Tribunal issued its decision while the Defendants' motion to dismiss was pending. On December 20, 2001, the Chancery Court granted the Defendants' motion, ruling that the fiduciary duty claims per the Action were instead *"in connection with"* the Underwriting Agreement and were therefore mandatorily arbitrable ("2001 Decision").[9]

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[6] The Underwriting Agreement dealt principally with a singular event, the raising of US$ 2MM in capital and the reapportionment of stockholding interests in Mirror Image as a result. While the Underwriting Agreement did contain a broad arbitration clause, had nothing to do with corporate governance or the on–going relationship between the stockholders and/or the directors of Mirror Image. The underlying litigation is not based on that contract.

[7] Essentially, the Tribunal found that the Underwriting Agreement was fraudulently induced and that Xcelera had breached its contractual obligations towards Plenteous and that Plenteous had suffered damage as a consequence of an unfair dilution. The Tribunal explicitly noted that Plenteous' claims in the arbitration were not based on Delaware law or the Plaintiffs' rights as minority stockholders.

[8] The Arbitral Award set the parameter of damages, noting *"the Tribunal shall rule that the Underwriting Agreement is invalid between Plenteous and the Respondent and that the Respondent is liable to compensate Plenteous for the damage suffered because of the two decisions on April 23, 1999, and July 10, 1999 to issue shares in MII Inc., made without the consent from either Mr. Lygren or Mr. Karlsten".*

In November 2002, the Delaware Supreme Court reversed the 2001 Decision ("2002 Decision).[10] Per the 2002 Decision, the Delaware Supreme Court held that the Plaintiffs had the right to have the merits of their fiduciary duty claims adjudicated by the Chancery Court, and that the overlapping nature of the Action and the Swedish Arbitration were independently and separately assertable.[11] Further, the Plaintiffs were not required to arbitrate the fiduciary duty claims.[12] As petitioners, the Defendants then filed for a petition of certiorari in the Supreme Court of the United States ("this Court"). The petition was denied.[13]

D. The Underlying Action (2003—2005)

On remand, the Action proceeded and the Plaintiffs secured contingency counsel.[14] Having failed to convince the Delaware Supreme Court that the Action should stand dismissed in favor of the Swedish Arbitration, the Defendants then turned their attack to the Swedish Arbitration. On October 20, 2003, ten months after an amended complaint was filed, the Defendants moved to have the Chancery Court enjoin the Swedish Arbitration ("Motion to Enjoin").[15] The Motion to Enjoin was advanced under two deliberate misnomers.[16] Nevertheless, Plenteous again offered to stipulate that it would refrain from claiming damages per the Swedish Arbitration until completion of the Action. This offer was rejected by the Defendants, who chose instead to proceed with the Motion to Enjoin, which ultimately failed.

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[9] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211.

[10] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A 2d 149.

[11] *Ibid.* The Delaware Supreme Court ultimately determined that the Chancery Court was too expansive in its earlier determination of the contractual term *"in connection with"*.

[12] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245.

[13] *Mirror Image Internet, Inc. v. Parfi Holding AB*, 538 U.S. 1032, 123 S.Ct. 2076. *Inter alia*, the plaintiffs as respondents contested the Petitioners' assertion of federal jurisdiction.

[14] Between January and October 2003, the parties served and responded to discovery. In October 2003, the Delaware Chancery

In 2004, the Chancery Court rendered its opinion ("2004 Opinion").[17] Curiously, and despite the 2002 Decision, the Chancery Court *sua sponte* stayed the case in all respects, until the Swedish Arbitration was completed, including appeal rights ("Stay Order").[18] The Stay Order was not substantively justified

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Court extended fact discovery and adjusted other pre-trial dates, anticipating a fall 2004 trial.

[15] The amended complaint was filed per the 2001 Decision.

[16] First, whereas it was claimed that a demand letter sent by Swedish counsel for Plenteous ("Swedish Counsel") to Swedish counsel for the Defendants viz. the Swedish Arbitration was a double-recovery effort, the motive for the Demand Letter was merely to preserve interest entitlements according to Swedish law. Second, that Plenteous had promised that it would not arbitrate. While true that *pre*– the 2002 Decision, Plenteous had offered not to proceed with the Swedish Arbitration, that offer was not accepted.

[17] *Id.*, *supra* at 12.

[18] February 12, 2004. In other words, the Chancery Court denied both parties the one thing they sought to avoid, which was to have to both arbitrate and litigate.

and failed to justify the apparent dichotomy, namely that the Delaware plaintiff rights and Plenteous' Swedish rights (viz. the Damages Phase) were admitted to be *simultaneous*.[19] Moreover, the Chancery Court patently failed to take into account other key considerations despite well-settled case law of several decades' standing.[20]

Although the Chancery Court's cited rationale for the Stay Order was based ostensibly on efficiency concerns, it is clear that the Stay Order was predicated upon a raft of manifest errors. Nevertheless, notwithstanding the Plaintiff's misgivings, the path ahead required the Damages Phase to be finalized, even though by then, the Plaintiffs had been ***financially constrained*** to enter into a contingency arrangement with US counsel.[21]

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[19] The parties had, after all, merely disagreed whether Plenteous should permanently forgo the Swedish Arbitration.

[20] First, the Stay Order deprived Plenteous of its right to proceed "independently" and "separately" with both the Swedish Arbitration and the Action, as previously permitted by the Delaware Supreme Court, despite the Chancery Court noting its deference. Second, since the 2002 Decision, in terms of the *forum coveniens*, the status quo had ostensibly remained the same since before the Defendants' motion to dismiss, i.e. when at that stage, the Defendants had been quite keen to proceed with the Swedish Arbitration, albeit in lieu of the Action. Third, the parties shared the view that the Action should be the focus. Fourth, the Chancery Court failed to take into account a number of prevailing key factors, per ***McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g***, 263 A.2d 281. Key factors included: (i) that only the Plaintiff Plenteous stood to gain anything under the Swedish Arbitration; (ii) the costs of the Swedish Arbitration when the Plaintiffs were served by contingency counsel; (iii) the likely effects upon said counsel; (iv) the Swedish Bar requirements which prohibit contingency arrangements; (v) the steps that had already been taken in the Action; and (vi) the costs which had been expended in maintaining the Action, which up to the appointment of contingency counsel stood at some US$ 2MM in the US alone.

On September 13, 2004 the parties attended a status conference where the Chancery Court's requirement for progression in the Damages Phase was stated in no uncertain terms. Nevertheless, it was Plenteous' evidence via the Petitioner that Plenteous was subsequently faced with unanticipated financial issues, preventing it from posting the necessary costs to commence the Damages Phase and the subsequent costs including lawyers, experts, etc.. As such, the Damages Phase could not proceed as anticipated.

The Plaintiffs' inability to proceed with the Damages Phase clearly angered the Chancery Court. Seizing on these difficulties, twelve months and two days after the Stay Order, the Defendants moved on 14 February 2005 to dismiss the Action for want of prosecution pursuant to Chancery Court Rule 41(e) ("Motion to Dismiss").[22] The Defendants cited the fact that

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[21] In view of the Stay Order, the Plaintiffs first sought to explore appeals possibilities but were told that this was not possible given the Stay Order was an interlocutory decision. Moreover, the timing of the first client meeting post the 2004 Opinion meant that to all intents and purposes, an appeal notice would have been out of time.

[22] At A227–254 hereto. Henceforth for the purposes herein, Chancery Court Rules shall be abbreviated to the acronym "CCR". CCR 41(e) provides as follows:

"RULE 41. DISMISSAL OF ACTIONS.

...

(e) Inaction for 1 year; dismissal. Subject to the provisions of Rules 23, 23.1 and 23.2 in each cause pending wherein no action has been taken for a period of 1 year, the Court may upon application of any party, or on its own motion, and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given, or the parties have stipulated with the approval of the Court as to such matter."

Plenteous had not initiated the Damages Phase. Shortly thereafter, on February 18, 2005, the plaintiffs moved to lift the Stay Order and reinstate the Action. (A255–285). In support, on December 1, 2004 the Petitioner deposed an affidavit-in-support ("2004 Affidavit"). (A259–266). The 2004 Affidavit explained to the Chancery Court why the Damages Phase was untenable.[23] The Plaintiffs filed an opposition to the Motion to Dismiss. (A287–293).

The Petitioner's 2004 Affidavit was to prove highly contentious.[24] At a resulting March 3, 2005 status conference the Plaintiffs were given the choice between (i) foregoing all of the rights under the Swedish Arbitration (ii) dismissal of the Action or (iii) an extensive discovery process. Plenteous refused to bow to the perceived ***undue pressure*** exerted by the Chancery Court.

Whence, the "price paid" was a discovery order in order to determine whether there were grounds to dismiss the Action.[25] On May 5, 2005, the Defendants'

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[23] Also appending an affidavit (in letter form) of Olof Nilsson ("Nilsson Affidavit"). (A267–284). In effect, the Nilsson Affidavit corroborated that Swedish Counsel was in receipt of good faith instructions to proceed with the Swedish Arbitration. Thus, to such extents, the Nilsson Affidavit corroborated the Petitioner's 2004 Affidavit.

[24] Including at the time of Nilsson's status report of 09.20.04 ("Status Report": A249–250), Nilsson was in receipt of instructions to initiate the Swedish Arbitration as soon as preparations had been completed, and moreover that Nilsson was *"optimistic at the time that the preparations were going to be completed by mid–October 2004"*. (A284).

[25] *Inter alia* over false representations to the Chancery Court, e.g. the Status Report from Swedish Counsel and the 2004 Affidavit. Taking full advantage of this opportunity, on Mar. 17, 2005, Defendants' Counsel served a broad and onerous discovery request upon the Plaintiffs concerning (1) the financial status of

Counsel then filed a motion to compel further discovery, which was heard on September 12, 2005.[26] During these proceedings, Defendants' Counsel made a wild and unsubstantiated allegation that the Petitioner was not merely a ***billionaire*** but — more than that – ***a multi-billionaire***, a charge which, at great cost to the Petitioner, would eventually prove to be entirely fruitless.[27]

Nevertheless at the time, clearly vexed, the Chancery Court granted the Motion to Compel, with costs which included the Defendants' reasonable attorney fees and expenses.[28] Moreover, in so doing, the Chancery Court plainly ignored that the Petitioner was not a party to the proceedings, and no grounds were pleaded or made out justifying any piercing of the corporate veil.[29]

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each Plaintiff and non–party Lygren (the Petitioner); (2) the Joint Prosecution Agreement; (3) preparations for and delays regarding the damages arbitration; (4) investments referenced in the 2004 Affidavit and; (5) attorney–client communications and work product involving all Plaintiffs' US Counsel, and Swedish Counsel. The Plaintiffs produced voluminous documents and detailed privilege logs but refused the full ambit of requests.

[26] In opposition, the Plaintiffs argued that certain information sought was privileged and that discovery of individuals or entities other than Plenteous was irrelevant to the Action, as was discovery of Plenteous' financial status prior to the Stay Order.

[27] This was made without foundation, to deliberately negatively color the Petitioner's posture that Plenteous was unable to fund the Damages Phase. On two occasions Defendants' Counsel went on lambaste the Petitioner's posture as *"ludicrous"*.

[28] By all accounts, what followed was an excruciating discovery process which even went so far as to comprise personal tax records of non–parties.

[29] For example, it could never be remotely implied that the Petitioner was under any personal obligation to fund the Action.

E. THE UNDERLYING ACTION (2006—2008)

The Plaintiffs' Contingency Counsel then moved to withdraw, claiming good cause. The "good cause" cited (essentially) a material deterioration of the client-attorney relationship. By way of a letter opinion dated April 3, 2006, the Chancery Court then ordered that the Plaintiffs obtain successor counsel by May 15, 2006 (within 6 weeks) or suffer dismissal ("April 2006 Order").

The Plaintiffs secured new counsel, who wrote to the Chancery Court requesting sixty days to review the files and reach agreement with local counsel. The Court denied the request, instead entering an Order requiring: (1) an ***unconditional appearance*** and (2) that the appearance ***shall not be withdrawn***. The Chancery Court warned that if the Plaintiffs did not comply, then the Action would be dismissed. For ethical reasons, no ***unconditional appearance*** could be entered by the Plaintiffs' counsel. Hence, on June 1, 2006, the Chancery Court dismissed the Action for a *second time*. Upon appeal, the Delaware Supreme Court reversed in part and remanded the case.[30]

On August 15, 2007 the parties attended a case conference in the chambers of the presiding judge ("August 2007 Conf.").[31] The Chancery Court devoted much time to engaging counsel on questions related to the underlying merits of Plaintiffs' claims, seeing merit to the Plaintiffs' claim.[32]

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[30] *See, Parfi Holding AB et al. v. Mirror Image Internet, Inc., et al.*, 926 A.2d 1071.

[31] Strine VC. During that conference the parties agreed to (and then submitted) a scheduling order regarding the outstanding issues concerning the September 2005 Order, per the Motion to Dismiss.

[32] The Chancery Court also indicated that if the Plaintiffs survived the Defendants' attack on the Plaintiffs' standing and

The August 2007 Conf. resulted in an order dated September 10, 2007, forming the basis for further preparation viz. the Defendants' 2005 CCR 41(e) Motion to Dismiss.[33] The Plaintiffs responded in good faith to numerous additional and new document related issues that the Defendants raised; depositions proceeded; and the parties prepared their briefs.[34]

F. THE CCR 41(e) HEARING (JUNE 2008)

The CCR 41(e) Motion to Dismiss was heard on June 4, 2008 ("June Hearing"), culminating in the

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the Motion to Dismiss, the Plaintiffs would be permitted to proceed to the merits of the Action.

[33] The September 10, 2007 order provided:

1. Plaintiffs shall complete compliance with all document discovery, to the extent any such discovery relating to the Sep. 30, 2005 Order remains outstanding, by Sep. 28, 2007;
2. The parties shall complete depositions in accord with the Sep. 30, 2005 Order by Dec. 14, 2007;
3. Defendants shall file a supplemental brief regarding the pending motion to dismiss and the motion to lift the stay, and any standing issues by Jan. 15, 2008;
4. Plaintiffs shall file a brief in response to Defendants' supplemental brief by February 8, 2008;
5. Defendants shall file a reply brief by Feb. 19, 2008;
6. With respect to the attorneys' fee award per the Sep. 30, 2005 Order: (a) By Sep. 28, 2007, counsel for both parties will have a substantive discussion in a good faith effort to resolve the reasonableness of the attorneys' fees sought per the Order; and (b) if the parties are unable to reach an agreement, the parties shall each file a brief setting forth the party's position on the appropriate fee by Oct. 26, 2007.

[34] In total, circa 4000 pages of documents were produced. In addition, the Defendants deposed all of the witnesses per the discovery orders. Including Lygren (Dec. 12, 2007), Lindbo (Dec. 10, 2007), Gillberg (Jan. 22, 2008). and Nilsson (Jan. 15, 2008).

opinion dated September 4, 2008 ("2008 Opinion").[35] (A49–109). By this point, over three years had passed since the date of the originating Motion to Dismiss. The 2008 Opinion included a number of findings, ***inter alia*** that the Petitioner had perpetrated a fraud upon the court.[36] The tone and language of the 2008 Opinion is demonstrably hostile to the Petitioner.[37] The 2008 Opinion has been published and is available on the internet without restriction.[38] The Petitioner has suffered and continues to suffer damage to his reputation including his business reputation, a property right *in rem*.[39] These damages remain *at large*.[40]

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[35] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 2008 WL 4110698 (Del.Ch., Sept. 4, 2008).

[36] For example, *see* 2008 Opinion, at A84 hereto. *See,* also footnote 84, at A89 hereto: yet another example of the words "concocttion" and "false": *"The record clearly shows that Lygren concocted a false explanation in a bad faith attempt to persuade this court to lift the Stay Order under a false impression as to the material facts."* Bluntly, there is no *record* which can be safely relied upon to warrant the extreme sanctions here.

[37] By virtue thereof, the Chancery Court: (I) dismissed the Action under CCR Rule 41(b) and by virtue of its inherent jurisdiction; (II) in the alternative, dismissed the derivative counts of the case, on the basis that the Plaintiffs Parfi and Plenteous lack derivative standing by virtue of section 327 of the Delaware Constitution and CCR 23.1; (III) ordered fee–shifting to the sum of $33,529.75; (IV) denied lifting the Stay Order.

[38] For example, the following link is a posting on Yahoo, whereby the Petitioner is perceived as being brandished a *"liar"* by virtue of the 2008 Opinion: ***http://messages.finance.yahoo.com/Stocks_%28A_to_Z%29/Stocks_X/threadview?m=tm&bn=22955&tid=208389&mid=208398.***

[39] HOLLAND *"Elements of Jurisprudence: 1st American Edition from the 7th English Edition"* (2006) *150, *160.

[40] Ergo the property therein. Under Delaware law (i) as to defamation *see, Gill v. Del. Park, LLC,* 294 A. Supp. 2d 638, 646; (ii) as to "False Light Invasion of Privacy" the common law right of priv-

Moreover, the Chancery Court clearly *prior* understood the potential for damage which could be caused by virtue of an adverse ruling.[41]

G. NOTICE OF APPEAL (OCTOBER 2008)

On October 14, 2008 the Petitioner filed a Notice of Appeal on behalf of the Plaintiffs. (A111–114).[42] The Petitioner then asked counsel to promulgate the appeal. (A171–172). The Petitioner subsequently filed an appeal brief ("Appeal Brief").[43] The Appeal Brief was filed in time by the Petitioner *pro se*, in order that the appeal timetable was not hindered.[44]

In short form, the grounds of appeal cited per the Appeal Brief stated that the appeal arose by virtue of a hearing and opinion defective by virtue: (I) of a

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acy was first recognized in *Barberi v. News–Journal Co.*, 56 Del. 67 (1963).

[41] At the prior case conference dated August 15. 2007, the Chancery Court had stated *"And the next time the two brothers want to raise money in the United States, no one is going to deal with them. Well, look, the way the internet is now, I write a decision, you ain't going to hide it"* (8/15/07 Tr. p67).

[42] Parfi and Plenteous did not receive the transcript of the June Hearing until barely a week before the Appeal Notice was due. Upon review, it became apparent that aspects of that transcript placed the Parfi and Plenteous at odds with counsel. In simple terms, the Petitioner requested counsel to file the Notice of Appeal, but no such undertaking was forthcoming. Mindful of the approaching time–guillotine, Parfi and Plenteous were left with little choice but for the Petitioner to file the Notice of Appeal.

[43] Date of the Appeal Brief: November 13, 2008, amended November 17, 2008. Note the amendments were non–substantive and merely "tidied" aspects of the original Appeal Brief.

[44] By this point in time, it was clear counsel was unlikely to promulgate the appeal, and the timetable was such that an appeal brief was required.

plain error of a fact; [45] (II) the Defendants' motion was phrased exclusively in terms of CCR 41(e) and therefore the Defendants' failure to plead under CCR 41(b) whether in terms purportive to the Chancery Court's inherent jurisdiction or otherwise and whether in the alternative or at all, was fatal to any finding under CCR 41(b);[46] (III) the only source of inherent jurisdiction viz. the dismissal of an Action entirely, stems exclusively from CCR 41(e), [47] which in its opinion the

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[45] *See*, 56 (*infra*).

[46] CCR 41(e) provides as follows:

> "RULE 41. DISMISSAL OF ACTIONS.
>
> ...
>
> (b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these Rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the Court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction or for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

[47] Moreover, Defendants' Counsel misstated the law viz. three cases, to falsely claim that CCR 41(b) was a source of inherent juisdiction. First: *Nyce v. Stella*, 687 A.2d 196, 1996 WL 627524 (Del.Supr.): found under Rule 41(e) — the only reference to a Rule 41(b) is not a Chancery Court rule, but instead Federal Rule 41(b), whereby the Federal court retains its inherent jurisdiction because there is no equivalent Rule 41(e) in the Federal Rules

Chancery Court *itself* held as being inapposite; [48] (IV) the Defendants failed to plead explicitly any reliance on the Chancery Court's inherent jurisdiction; [49] (V) CCR 60(b) was wrongly appropriated by the Chancery Court, as application thereto can be made only on motion; [50] (VI) that in any event an examination of the

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Second, *Yancey v. National Trust Company, Ltd. and Others*, 633 A.2d 372, 1993 WL 370844 (Del.Supr.): the Rule 41(b) finding was made on motion. Third, *Antonios A. Alevizopoulos and Associates, Inc. and others v. Comcast International Holdings, Inc. and others*, 2000 WL 1677984 (S.D.N.Y.): was found pursuant to Federal Rule 41(b) and in any event was made on motion.

[48] *Id., supra* at 35.

[49] CCR 7(b) provides as follows:

"RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS.

...

(b) Motions and other papers.

(1) An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth clearly in the motion the relief sought ..."

[50] CCR 60(b) provides as follows:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER.

...

(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. – On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) fraud whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party... A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon record cannot support a finding as a "Fraud on the Court", howsoever arising, in that the three–limb test demanded by the Common Law, does not stand scrutiny, and in any event that there was no evidence (whether direct or circumstantial) capable of being directly probative to the issues purportedly at hand; [51] (VII) the Chancery Court failed to ascribe the rigor required in order to find a "Fraud on the Court" and in so doing misdirected itself; [52] (VIII) the history of the Action demanded judicial caution given the equity and

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> the Court. The procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action."

[51] Establishing fraud is essentially a three–stage test. First, an evidential test ("First Limb"): there must be "clear, unequivocal, and convincing evidence" *Smith v. Williams*, 2007 WL 2193 748 (*infra*, at 53). Second, the acts must be *in extremis*: *"a corruption of the judicial process itself, such as bribery of a judge or juror, improper influence exerted on the court by an attorney, or involvement of an attorney as an officer of the court in the perpetration of fraud."* Finally, there must be materiality ("Third Limb"). *Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, is an example of the three–limb test: a fraud on the court occurs "*where it can be demonstrated, clearly and convincingly,* ["First Limb"] *that a party has sentiently set in motion some unconscionable scheme* ["Second Limb"] *calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense* ["Third Limb"]." *Id.* *5.

[52] CCR 9(b) provides as follows:

"RULE 9. PLEADING SPECIAL MATTERS.

...

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."

merits of the Action.[53] Moreover, for the foregoing reasons the Chancery Court did so act as to render an opinion which represented an abuse of process as stipulated under the Common Law; and further did knowingly or recklessly render an opinion likely to be injurious to a person of good character and standing.[54]

In support thereof, the Petitioner also filed two additional affidavits.[55]

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[53] Dismissal is such an extreme sanction that even *"[p]erjury and fabricated evidence are not grounds for dismissal as these are evils that can be exposed at trial and court rules are fashioned to facilitate such revelations."* (*Smith v. Williams*, 2007 WL 2193748 at *5). The reason for such safeguards are obvious and reflect the high value Delaware places on a litigant's rights: *Wilson v. Taylor*, 466 F. Supp.2d 567. There, the court refused to impose *"drastic sanction"* of dismissal as it is only employed as a sanction *"in rare and limited circumstances"*. Further, in *Smith v. Williams*, (*ibid.* and *id.*, *supra* at 51) dismissal is the *"ultimate blow to a lawsuit"* and a *"drastic sanction [that] is generally reserved for instances where the defaulting party's misconduct is correspondingly egregious"*. Despite the *"apparent dishonesty, however reprehensible"*, nevertheless the court there refused to dismiss the case because the conduct did not amount to a Third Limb event, i.e. *"that species of fraud which attempts to disrupt the judicial process so that it cannot perform its task of fairly and impartially adjudicating cases."* Rather, the court explained that there are *"traditional safeguards within the system to guard against such false testimony"* and that *"the primary purpose of a trial is to seek out the truth from all of the strategies, tactics, hyperboles, exaggerations and even, in some cases, blatant dishonesty and falsehoods."* (at *6).

[54] *Id.*, *supra* at 41. Moreover, the equitable maxim *Ubi Jus Ibi Remedium*. *See*, the ancient case of *Ashby v. White* (1703) 1 Sm LC (13th Edn) 253 (HL), per Holt CJ: *"If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal..."*.

[55] Affidavits of the Petitioner deposed November 9, 2008 and November 13, 2008.

H. PETITIONER'S MOTION TO INTERVENE FOR THE PURPOSES OF SUBSTITUTION FOR THE PURPOSES OF APPEAL (NOVEMBER 2008)

Prior to filing the Appeal Brief, on November 2, 2008, the Petitioner moved in the Delaware Supreme Court to be allowed to intervene for the purposes of appeal, and thence stand substituted for Plenteous and Parfi for the purposes of promulgating an appeal against the 2008 Opinion and resultant order ("2008 Motion"). (A157–208). The 2008 Motion noted that the Chancery Court's sanctions were motivated on a finding that the Petitioner "*...concocted an affidavit designed to give the court a false impression that dire and unexpected financial circumstances precluded Plenteous from proceeding [with the Damages Phase]*".[56] The basis there is a finding that the Petitioner had enriched himself ("Transaction").[57] The 2008 Motion noted that this finding is plainly wrong, given that the Transaction originated from an obligation the Petitioner took over for consideration in 1998 from Procedo Capital Corp., a sister company of Plenteous.[58] Essentially, the same consideration accompanied the Transaction in the summer of 2003.[59] But even if the finding vis-à-vis consideration was correct, the Transaction was made ***more than a year*** before the 2004 Affidavit was sworn and (crucially) before the Stay Order.

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[56] Apparently, evidenced by *"Lygren's decision to have Plenteous give $1.3 million to himself in the summer of 2003."* Further: *"By that pledge, Plenteous relieved Lygren of a personal obligation to the bank in the amount of $1.3 million. That relief was provided to Lygren WITHOUT CONSIDERATION AND NO RECEIVABLE FROM LYGREN IS BOOKED AT PLENTEOUS"*. (The 2008 Opinion, at A81 hereto) [Strine VC's own emphasis IN CAPS is retained].

[57] The 2008 Opinion hinges on findings that (i) consideration was required for the Transaction; (ii) if it had been paid, Plenteous would have had the money to pay for the Arbitration; and (iii) moreover, since the Petitioner did not pay Plenteous the equivalent sum in cash *more than a year* after the Transaction, *then* Plenteous is deserved of the most extreme sanctions possible and the Petitioner deserving vilification.

Moreover, the 2008 Motion notes that the documents giving rise to the Transaction was produced during an exhaustive and expensive discovery, therefore in the possession of counsel for all parties in the Action. A further aggravating factor comprised Plaintiff counsel's failure to (i) bring certain documentation to the court's attention in time or at all; and (ii) accurately relay the court's enquiries to the Petitioner.[60]

The 2008 Motion also comprises an affidavit.[61] This affidavit confirms that all stockholdings (or rights thereto) in Mirror Image, whether legally or beneficially owned by Plenteous, were irevocably transferred to the Petitioner by way of a grant by deed ("Deed"), and that any and all rights in the Action hitherto enjoyed by Parfi and Plenteous were irrevocably assigned by way of a legal assignment ("Assignment") both dated October 28, 2008.[62]

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[58] Then dealt-with in the Petitioner's first affidavit filed subsequently with the Appeal Brief.

[59] But even ignoring the plain error, the court failed to adduce any direct evidence truly probative towards establishing the malfeasance thereafter complained-of i.e. ***"the representation that it was impossible for Plenteous to fund the Damages Arbitration was clearly false and designed to influence the court into lifting the Stay Order on false pretenses"***. (The 2008 Opinion, at A82 hereto). Even if no consideration had been paid, the Chancery Court also had a duty to determine whether at the time of the Transaction: (i) the events which occurred ***more than one year later*** (causing the Plaintiffs to seek to lift the Stay Order and Petitioner's 2004 Affidavit) were reasonably foreseeable; (ii) moreover, whether there was any duty for Plenteous to so crystal ball-gaze; especially when it was free of injunction; and (iii) the Transaction was undertaken for the express purpose of "positioning" Plenteous so that it could not afford to proceed with the Damages Phase.

[60] *See*, footnote 66 of the 2008 Opinion, with reference to Plaintiffs: ***"The plaintiffs promised to provide more information if that was in fact not the reality and have failed to do so"***. (A81 hereto).

[61] *See*, A163–208.

The Respondents objected to the 2008 Motion. (A211–216). The Petitioner answered the Respondents' objections.[63] (A219–225).

I. THE 2008 MOTION IS UNSUCCESSFUL

The 2008 Motion proved unsuccessful.[64] (A43–46). Three reasons are identified to such ends. First, that the Petitioner's failure to intervene in the Court of Chancery *"works as a forfeiture of any right to claim appellate standing."*[65] Second, that the Assignment *"appears to be a transparent attempt ... to circumvent the Court's directive that the appellants obtain counsel."*[66] Third, a mechanistic guillotine, namely that the Petitioner had failed to file a response to a "notice to show cause", and thus the Petitioner's failure to respond was *"deemed his consent to the dismissal of the appeal"*.[67]

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[62] The Deed and Assignment were effected pursuant to a third party review. *See,* affidavit (*ibid.*), where both are set out per the exhibits thereto, respectively at A198–199 and A200–208.

[63] Date of objection November 17, 2008; Petitioner's date of reply December 1, 2008.

[64] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 966 A.2d 348, 2009 WL 189862, (Del. Supr., Jan 12, 2009). (A43–46).

[65] *Ibid.*, ¶(4), at A45 hereof.

[66] *Ibid.*

[67] *Ibid.*, ¶(5). This is dealt with at ¶¶4–12 of the affidavit filed in support of the Motion for Rehearing. (A137–141). Essentially, the said Notice (A149–150), although dated October 30, 2008, was not dispatched to the Petitioner until November 20, 2008, to

J. PETITIONER'S MOTION FOR RE-ARGUMENT & RE-HEARING EN BANC (JANUARY 2009)

The Petitioner simultaneously filed a motion for re-argument and a motion for rehearing *en banc* ("2009 Motions").[68] (Respectively, A129–152 and A115–121).[69] All 2009 Motions were unsuccessful.[70] (A39–40 and A41–42). All decisions per the Delaware Supreme Court were entered onto the docket on February 4, 2009. (A37). Wherefore, the Petitioner petitions this Court for a writ of certiorari.

III. ARGUMENT

A. PRELIMINARY

The Petitioner's motivation for filing this Petition are amply demonstrated throughout the various affidavits filed in support of the 2008 Motion and 2009 Motions. Moreover, the Petitioner has set out a concise record of the Action. Although the Petitioner believes that the Appeal Brief demonstrates substantive merit,

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arrive at his place of residence in Switzerland — at a time when the Petitioner was in the United States on business. Having in mind the steps taken by the Petitioner and the letter of the court clerk dated November, 14, 2008 (A151), the business travel commitments of the Petitioner at that time, it is difficult to reconcile how there could ever be a *"deemed consent"*. Matters are further compounded given that the Respondent had also provided the Delaware Supreme Court an address in the United States, yet unlike other documentation, the said Notice was not sent there.

[68] Motion for Rehearing *en banc* and Motion for re-argument both filed January 27, 2009.

[69] For the sake of producing a concise Appendix at this stage, note that the entire motion for Rehearing *en Banc* is attached. This comprises all motions subsequent to the Notice of Appeal.

[70] Motion for Re-argument and Motion for Rehearing *en banc* refused by virtue of orders of the Delaware Supreme Court, dated respectively January 29, 2009 and February 2, 2009.

the question posed by the Petitioner before this Court resides solely in the Delaware Supreme Court's order of January 12, 2009. (A43–46). By virtue of the 2008 Opinion, the Petitioner's reputation has been damaged, and damages are at large.[71] The Appeal Brief demonstrates a *prima facie* inference that the 2008 Opinion was an *ambush*; comprising a plethora of serious procedural flaws to be tested by the Delaware Supreme Court, had the 2008 Motion been allowed. In effect, the grounds per the Appeal Brief *prima facie* demonstrate that the events leading to the 2008 Opinion were pre–textual: that throughout entire history of the underlying Action, the Chancery Court has demonstrated palpable arbitrary bias against hearing the Action, despite the abundance of settled case law for a plaintiff to have his case heard. Moreover, from research, there is apparently no case on record whereby the same facts have prevented substitution or intervention. Further, the Delaware Constitution is silent on the issues raised here.[72] Finally, the 2008 motion was timely.[73]

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[71] *See*, especially 38 and 39, ***supra***.

Moreover, there exists substantive precedent to confirm the Petitioner is of tested good plaintiff character. *See, International Minerals and Resources S.A. v. Pappas*, 761 F. Supp. 1068 (S.D.N.Y. 1991); 96 F.3d 586 96 F.3d 586; 2nd Cir. (N.Y.) (1996); 5 Fed. Appx. 5, 2001 WL 196691, 2nd Cir. (N.Y.). Lygren as witness for plaintiffs, where it was found that the defendants there had intentionally and maliciously interfered with the Plaintiffs' contract. It can be safely inferred that at jury trial, Lygren's ***credibility*** was preferred.

[72] (Del. Const. art IV, § 11). That the 2008 Opinion pertains to a hitherto non–party plainly makes the finding reviewable for the reasons extolled in the Appeal Brief and especially where there are ***prima facie*** grounds for demonstrating plain error.

B. PROPERTY RIGHTS EJUSDEM GENERIS

The Petitioner is both an assign and transferee of the underlying rights in the Action, and stockholdings. Strictly, appellate rights are property *ejusdem generis* (and part of plaintiff–rights), thus capable of assignment. *Per se*, a corporation can validly assign a claim, even if made to circumvent the prohibition against a corporation appearing for itself.[74] This reflects the general notion that underlying plaintiff–rights are alienable species of property therefore capable of transfer save for circumstances whereby such a transfer is lawfully prevented or fettered, for example by way of injunction, statute, private encumbrance or treaty *inter parte*. There are no such fetters here, including any by way of treaty *inter parte,* and no fetters exist vis–à–vis the stockholdings (or rights thereto) either. Thus, the plaintiff–rights here were always free and full.[75] *Inter alia*, these rights also comprised *ejusdem generis* the right to invoke a claim and invoke and prosecute an appeal, in strict terms property rights emanating *inter alia* from the Fourteenth Amendment to the U.S. Constitution equally (and thus *ejusdem generis*), *mutatis mutandis*. Thus, per the ancient Statute of Frauds the assignee would expect the same substantial rights to pass,

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[73] Cf. *United States of America v. LTV Corporation* 746 F.2d 51 (D.C. Cir. 1984) where the would–be appellant Wheeling failed to seek to intervene for the purposes of appeal at the right time.

[74] *See,* State of New York cases *Traktman v. City of New York*, 182 AD2d 814, 815; *Medical Facilities v. Pryke*, 172 AD2d 338.

[75] If enjoyment is full and free, it therefore matters not the reasons for the assignments and grants. Also, *see, Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) *("a corporation is a 'person' within the meaning of the ... due process of law clauses").*

given the necessary *quid pro quo* namely that *nemo dat quod non habet.*

Moreover, upon close inspection, an appellate right first vests when seised in the Court–below, as plaintiff–rights *ejusdem generis*, and thus *sine qua non* also cannot vest *irrevocably* exclusively so.[76] Further, per the Fourteenth Amendment, denying the 2008 Motion wrongly deprived the Plaintiffs–below retroactively of those *ejusdem generis* rights, or sought to limit such rights, to thus confer standing at this Court.[77]

Moreover, an assignment of rights can act to allow substitution at the appellate stage.[78] And quite rightly, given that an appeal divests a trial court of jurisdiction in favor of the appellate court.[79] Thus, the

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[76] Here, the appeal right vests by virtue of the 2008 Opinion. To hold this appellate right *sui generis* as somehow *irrevocably* exclusive would interfere with the Plaintiffs–below's (and their assigns') unfettered right viz. free and full enjoyment. And, if the title was unfettered, it therefore follows, then so any unreserved assignment or grant etc.

[77] I.e. to deny the motion (plainly) would be *"a wrong which directly results in the violation of a legal right"*: *Alabama Power Co. v. Ickes,* 302 U.S. 464, 479 (1938). It would also deny the Petitioner his rights too.

[78] *See, CSFB 1998–C2 Park Mill Run, L.L.C. v. Garden Ridge Hilliard Delaware Business Trust,* 2006–Ohio–1535 ("CSFB"):

"During the pendency of this appeal, we have granted Park Mill Run's motion to substitute in its place as appellee CadleRock's Hilliard Property, L.L.C. ("CadleRock's"), pursuant to an assignment making CadleRock's the real property in interest in the matter." [at 1, emphasis added].

[79] Thus, to deny the Motion would otherwise provide a mechanism for any defendant to then evade justice, upon learning of a happenstance reorganization of a corporate plaintiff into (say) a "Newco" within 30 days of an adverse final judgment (the time period for filing an appeal notice to the Delaware Supreme Court). All a defendant would have to do is issue an appeal notice in time: thence the Newco would be unable to take–on the appeal. Other-

2009 Order *reductio ad absurdum* retroactively limits the assignors' prior rights in the property, nevermind the assignee's then–right of free enjoyment. Thus, in strict terms, if the Assignment or Deed cannot be disturbed for formalities' reasons, then neither can the effects of any terms therein.

C. DUE PROCESS

It is beyond doubt that a person or corporation may not be deprived of its property without *due process*.[80] In this case, the due process aspects pertain to (i) the infringement of those rights discussed, rendered per the 2009 Order of the Delaware Supreme Court; (ii) the Petitioner being prevented from mitigating the damage caused to his reputation by the 2008 Opinion. In respect of the former, nowhere in the 2009 Order does the Delaware Supreme Court make any reference to having even considered the property species points. As to the latter, the court labors per the somewhat arbitrary doctrine per *Bryan v. Doar*.[81] Moreover, *Bryan v. Doar* cites *Microsystems v. Scandinavia Online* which clearly countenances the due process aspects.[82] In contrast, here the 2009 Order demonstrably fails to consider these due process aspects, and moreover that *Microsystems* clearly countenances exceptions to the general

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wise, Newco as transferee would equally have no appellate standing, notwithstanding any transfer of all underlying rights into Newco. In Newco's case the property would be the right of recovery in the judgment amount.

[80] *See, Smyth v. Ames*, 169 U.S. 466 (1898). Also *see, Kentucky Co. v. Paramount Exch.*, 262 U.S. 544, 550 (1923); and *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

[81] *Bryan v. Doar* 918 A.2d 1086, (2006).

[82] *Microsystems v. Scandinavia Online AB* 226 F.3d 35 (2000).

rule, where due process is in doubt.[83] This aspect is hardly controversial.[84] As such, *Microsystems* comprises an inherent scope to reflect well-established themes viz. those concerns of this Court to safeguard the due process clause of the U.S. constitution, whereby the right to rebuttal is pivotal.[85] Yet, in these pivotal aspects, the 2009 Order is silent. Further, the rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well-settled.[86] Moreover, the critical inquiry is whether in view of all the circumstances the would-be intervenor acted promptly after the entry of final judgment.[87]

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[83] *Microsystems (ibid.)* is cited in *Bryan v. Doar, id., supra* at 81. For example, *see, Microsystems* therein: *"We explain briefly why, in either of these events, due process is not at risk"* [at *17, emph. added].

[84] *See, Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, 476 (1918). For example, it is unconstitutional to enforce a judgment without first allowing an opportunity to be heard sometime before final judgment is entered. *See also, Baker v. Baker, Eccles & Co.,* 242 U.S. 294, 403 (1917); *Louisville & Nashville R.R. v. Schmidt,* 177 U.S. 230, 236 (1900).

[85] *See, Saunders v. Shaw,* 244 U.S. 317 (1917). Where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material, was held to have been deprived of his rights without due process of law.

[86] *See, Louisiana v. Jack,* 244 U.S. 397. Moreover, *Marino v. Ortiz,* 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) at 304: *"We think the better practice is for such a nonparty to seek intervention for purposes of appeal."*

[87] *See, United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977). Here, the respondent filed her motion within the time period in which the named plaintiffs could have taken an appeal. *See,* also *Pellegrino, v. Nesbit et al* 203 F.2d 463. There, the District Court entered judgment for the defendants, and, when the corporation

Further, it is essential in the administration of the system of justice, that litigants should have their day in court.[88] Post-judgment intervention for the purpose of appeal has been found to be timely in litigation that is not representative in nature. [89]

D. CONCLUSION

Whence, constitutionally-protected, the *property* and *due process* aspects extolled above confer the Petitioner's standing. Per the 2009 Order, the Delaware Supreme Court has failed to consider the property aspects arising (i) by virtue of the Deed and Assignment; and (ii) per the damage caused to the Petitioner's reputation by the 2008 Opinion. Further, the Delaware Supreme Court has failed to consider the due process aspects. Moreover, to deny for "circular reasoning" would also be incongruent, given latterly this Court is

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failed to appeal, a stockholder sought to intervene for the purpose of appealing from the District Court decision. The Court of Appeals, reversing the District Court, ruled that the motion was timely and that intervention should have been permitted.

[88] *See, American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 3 F.R.D. 162 (SDNY). There, intervention allowed: the motion was filed within the time in which an appeal might have been brought, the District Court ruled that the motion to intervene was timely.

[89] I.e. in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase. *See,* for example, *Hodgson v. United Mine Workers,* 153 U.S.App.D.C. 407, 417-419, 473 F.2d 118, 129; *Smuck v. Hobson*, 132 U.S. App. D.C. 372, 378-379, 408 F.2d 175, 181182; *Zuber v. Allen*, 128 U.S. App.D.C. 297, 387 F.2d 862, discussed in *Hobson v. Hansen*, 44 F.R.D. 18, 29-30, n. 10 (DC); *Wolpe v. Poretsky,* 79 U.S.App.D.C. 141, 144, 144 F.2d 505, 508; *United States Cas. Co. v. Taylor*, 64 F.2d 521, 526-527 (CA4).

more liberal in granting standing.[90] Especially when "injury in fact" to some interest "economic or otherwise", is within the *zone of interest* to be protected by the constitutional provision in question. [91] Even from its simplest tenet, it was always open to the Chancery Court to consider the 2004 Affidavit as evidence merely of a businessman doing his best to trying to preserve an investment corporation. [92]

As a result of the 2008 Opinion, real damage has been caused, despite Delaware law being highly protective of the *sound business judgment* doctrine.[93]

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[90] *See, Ass'n of Data Processing Service Org. v. Camp,* 397 U.S. 150 (1970). If the plaintiff is given standing to assert his claims, his interest is protected; if standing is denied, there is no protection, as injury had to be *"one of property ... one protected against tortious invasion". Tennessee Power Co. v. TVA,* 306 U.S. 118, 137–138 (1939). This Court now finds standing not grounded in property rights per "Zone of Interest" (*see,* for example *Joint Anti–Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951)).

[91] *See,* also *Barlow v. Collins,* 397 U.S. 159 (1970). "Zone of Interest" is a prudential rather than constitutional test. Thus, although in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), this Court refers to injury as *"an invasion of a legally–protected interest",* here, it would be any interest this Court finds protectable.

[92] *See,* 1 A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. d (1994): stating that the business judgment rule protects directors *"from the risks inherent in hindsight reviews of their unsuccessful decisions".*

[93] *See,* also *Brehm v. Eisner* 906 A.2d 27, 52. *See, In re Walt Disney Co. Derivative Litig. (Disney V),* 907 A.2d 693, 697 (the defendants were entitled to business judgment rule protection), *aff'd,* 906 A.2d 27; *In re BHC Commc'ns, Inc. S'holder Litig.,* 789 A.2d 1, 4 (*"[I]t is a bedrock principle of Delaware corporate law that, where a claim for breach of fiduciary duty fails to contain allegations of fact that, if true, would rebut the presumption of the business judgment rule, that claim should ordinarily be dismissed under Rule 12(b)(6).*"); *Weinberger v. United Fin. Corp. of Calif.,* Civ. A. No. 5915 (1979), 1983 WL 20290, at *6 (to defeat a summary judgment motion, a plaintiff can *"all-*

Thus, it was always open to the Delaware Supreme court to distinguish matters here from the cited case of *Bryan v. Doar*, especially in light of the Deed and Assignment.[94] Moreover, itself drawing from *Microsystems v. Scandinavia Online* demonstrates there was always ample scope to distinguish matters here.[95] Instead, the 2009 Order demonstrably fails to even consider the nuances here. Moreover, the Delaware Supreme Court was in receipt of the Appeal Brief, which disclosed abundant grounds to believe an appeal was *at least* triable having in mind the highly extensive record and the damages *at large*.

Wherefore, for the reasons aforesaid, given the rights infringed pertain directly to property rights and due process, the Petitioner believes that the case for the Petition is soundly made out.

Respectfully submitted.

ATLE LYGREN, *pro se*
THE PETITIONER

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FAX: +41 27 775 3869

DATED: JULY 2, 2009.

---

ude to facts in the record which are undisputed or which are disputed but, if true, are sufficient to rebut the presumption" of the business judgment rule).

[94] *Id.*, *supra* at 81.

[95] *Id.*, *supra* at 82.

[END OF PETITION]

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No.

IN THE
Supreme Court of the United States

ATLE LYGREN,

Petitioner,

v.

MIRROR IMAGE INTERNET, INC.,
XCELERA.COM, INC., ALEXANDER M. VIK,
GUSTAV VIK AND HANS MAGNUS FAJERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DELAWARE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

ATLE LYGREN
Pro se

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB,	§	
and PLENTEOUS CORP.	§	No. 518, 2008
	§	
v.	§	Court of
MIRROR IMAGE	§	Chancery
INTERNET, INC.,	§	
XCELERA.COM, INC.,	§	C.A. No. 18507
ALEXANDER M. VIK,	§	
GUSTAV VIK and HANS	§	
MAGNUS FAJERSON	§	

The following docket entry has been e-filed in the above cause.

February 4, 2009. Certified copy of Orders dated January 12, 2009, January 29, 2009, and February 2, 2009, to Clerk of Court Below. **Case Closed.**

cc: The Honorable Leo E. Strine, Jr., Mr. Atle Lygren, Jessie A Finkelstein, Esquire, Brock E. Czeschin, Esquire.

Register in Chancery
Received Above

Date: February 4, 2009

/s/ Audrey F. Bacino

Audrey F. Bacino
Assistant Clerk of Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB, and	§	
PLENTEOUS CORP.,[1]	§	No. 518, 2008
	§	
Plaintiff Below,	§	Court Below –
Appellants,	§	Court of Chancery
v.	§	of the State of
	§	Delaware in and
MIRROR IMAGE INTERNET,	§	for New Castle
INC., XCELERA.COM, INC.,	§	County
ALEXANDER M. VIK,	§	
GUSTAV VIK and HANS	§	
MAGNUS FAJERSON	§	
Defendants Below,	§	C.A. No. 18507
Appellees.	§	

Submitted: January 28, 2009
Decided: February 2 , 2009

Before **STEELE,** Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGLEY**, Justices, constituting the Court *en Banc.*

ORDER

This 2nd day of February, 2009, the Court has carefully considered the motion for rehearing *en Banc* filed by the appellee and it appears that the motion for rehearing *en Banc* is without merit and should be denied.

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[1] The Court has *sua sponte* corrected the caption to reflect the parties on appeal as set forth in the professed appellant's *pro se* notice of appeal.

NOW THEREFORE IT IS HEREBY ORDERED that the motion for rehearing *en Banc* is DENIED.

BY THE COURT:

/s/ Carolyn Berger

Carolyn Berger
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, and	§	
PLENTEOUS CORP.,[1]	§	No. 518, 2008
	§	
Plaintiff Below,		
Appellants,	§	Court Below –
	§	Court of Chancery
v.	§	of the State of
	§	Delaware in and
MIRROR IMAGE INTERNET,	§	for New Castle
INC., XCELERA.COM, INC.,	§	County
ALEXANDER M. VIK,	§	
GUSTAV VIK and HANS	§	
MAGNUS FAJERSON	§	
Defendants Below,	§	C.A. No. 18507
Appellees.	§	

Submitted: January 28,2009
Decided: January 29, 2009

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

ORDER

This 29th day of January 2009, the Court having carefully considered appellant's Motion for Re-argument of the Court's Order dated January 12, 2009, and it appearing that the same should be denied;

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[1] The Court has *sua sponte* corrected the caption to reflect the parties on appeal as set forth in the professed appellant's *pro se* notice of appeal.

NOW, THEREFORE, IT IS ORDERED that appellant's Motion for Reargument be, and the same hereby is, DENIED.

BY THE COURT:

/s/ Carolyn Berger

Carolyn Berger
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, and	§	
PLENTEOUS CORP.,[1]	§	No. 518, 2008
Plaintiff Below,	§	
Appellants,	§	Court Below –
	§	Court of Chancery
v.	§	of the State of
	§	Delaware in and
MIRROR IMAGE INTERNET,	§	for New Castle
INC., XCELERA.COM, INC.,	§	County
ALEXANDER M. VIK,	§	
GUSTAV VIK and HANS	§	
MAGNUS FAJERSON	§	
Defendants Below,	§	C.A. No. 18507
Appellees.	§	

Submitted: December 12, 2008
Decided: January 12, 2009

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

ORDER

This 12th day of January 2009, it appears to the Court that:

(1) On October 14, 2008, Mr. Atle Lygren, filed a *pro se* notice of appeal from the Court of Chancery's opinion of September 4, 2008 and order dated

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[1] The Court has *sua sponte* corrected the caption to reflect the parties on appeal as set forth in the professed appellant's *pro se* notice of appeal.

September 11, 2008[2] that dismissed the plaintiffs' claims in this long-standing derivative action.[3] Lygren was not a party to the underlying derivative action; he was, however, identified as the representative of Plenteous Corporation. Lygren's *pro se* notice of appeal named, as appellants, plaintiffs-below Parfi Holding AB and Plenteous Corporation ("the appellants").

(2) In Delaware, a corporation can act before a court only through an agent duly licensed to practice law.[4] With this in mind, the Clerk, by letter dated October 15, 2008, directed Lygren, who is not a lawyer, to have counsel enter an appearance on behalf of the appellants. The Clerk advised Lygren that counsel must enter an appearance on or before October 27, 2008 in default of which a notice to show cause would issue. Lygren responded by letter dated October 21, 2008 advising the Clerk that "the issue of representtation by counsel ha[d] not been resolved yet."

(3) On November 2, 2008, Lygren filed a "motion for substitution of plaintiff-below appellants." Based on the appellants' purported assignment to him

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[2] The September 4 opinion, as effectuated by the September 11 order, dismissed plaintiffs' derivative claims (i) "pursuant to the Court's inherent authority to address misconduct in the litigation process"; (ii) "on the alternative ground that plaintiffs lack standing to assert such claims"; and (iii) "on the alternative ground that Plaintiffs are inadequate derivative plaintiffs." Moreover, the Court of Chancery ordered that plaintiffs pay to defendants the sum of $33,529.75 in attorney's fees and expenses and denied plaintiffs' motion to lift stay. *Parfi Holding AB v. Mirror Image Internet, Inc.*, 2008 WL 4110698 (Del. Ch.).

[3] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 926 A.2d 1071 (Del. 2007); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002).

[4] *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 1990 WL 168276 (Del. Supr.).

of "all rights identified and stipulated," Lygren sought to "intervene for the purposes of appeal and stand substituted for Plenteous and Parfi." The defendants-below/appellees oppose the motion and seek dismissal of Lygren's appeal.

(4) Having carefully considered the procedural history of this case and the respective positions of Lygren and the appellees, the Court concludes that Lygren's "motion for substitution of plaintiff-below appellants" must be denied. First, Lygren's failure to intervene in the Court of Chancery "works a forfeiture of any claim to appellate standing."[5] Second, on the face of it, the purported assignment to Lygren of the appellants' claims appears to be a transparent attempt by Lygren to circumvent the Court's directive that the appellants obtain counsel. Lygren's efforts to sidestep the Court's order "demonstrate the underlying purpose of the rule prohibiting the appearance of a corporation by anyone other than a member of the Bar of this Court."[6]

(5) Finally, the Court notes that on November 3, 2008, the Clerk issued a notice directing that Lygren show cause why this appeal should not be dismissed for his failure to have counsel enter an appearance on behalf of the appellants by October 27, 2008, as directed by the Clerk's letter of October 15, 2008. It appears that Lygren received the notice to show cause on December 1, 2008; however, he has not filed a response to the notice, and counsel has not entered an appearance on behalf of the appellants. Under these circumstances, Lygren's failure to respond to the Clerk's

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[5] *Bryan v. Doar*, 918 A.2d 1086, 1089 (Del. 2006).

[6] *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 1990 WL 168276, at *1 (Del. Supr.).

notice is deemed to be his consent to the dismissal of this appeal.[7]

NOW, THEREFORE, IT IS HEREBY ORDERED that the "motion for substitution of plaintiff-below appellants" is DENIED, and this appeal is DISMISSED pursuant to Supreme Court Rules 3(b)(2) and 29(b).

BY THE COURT:

/s/ Carolyn Berger

Carolyn Berger
Justice

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[7] 7 Del. Supr. Ct. R. 29(b).

GRANTED

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD.,

Plaintiffs,

v.

MIRROR IMAGE INTERNET INC., XCELERA INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,

Defendants.

C.A. No.
18507-VCS

ORDER

WHEREAS, Defendants having moved for an order dismissing this action pursuant to Rules 41(b) and (e) and the inherent power of the Court; on the grounds that Plaintiffs lack standing to assert derivative claims; and on the grounds that Plaintiffs are inadequate derivative plaintiffs (the "Motion to Dismiss");

WHEREAS, Defendants having applied for an award of attorneys' fees and expenses pursuant to the Court's September 10, 2007 Order (the "Fee Application");

WHEREAS, Plaintiffs having moved to lift the stay of this action (the "Motion to Lift Stay"); and

WHEREAS, on September 4, 2008, the Court issued an Opinion addressing the Motion to Dismiss, the Fee Application and the Motion to Lift Stay (the "Opinion"):

IT IS HEREBY ORDERED, for the reasons set forth in the Opinion, that:

1. Plaintiffs' claims are DISMISSED in their entirety and with prejudice under Rule 41(b), and pursuant to the Court's inherent authority to address misconduct in the litigation process;

2. Plaintiffs' derivative claims are DISMISSED on the alternative ground that Plaintiffs lack standing to assert such claims;

3. Plaintiffs' derivative claims are DISMISSED on the alternative ground that Plaintiffs are inadequate derivative plaintiffs;

4. Plaintiffs shall pay to Defendants the sum of $33,529.75 in attorney's fees and expenses on or before October 4, 2008; and

5. Plaintiffs' Motion to Lift Stay is DENIED.

/s/ Leo E. Strine

Judge Leo E. Strine
Vice Chancellor

Dated: September 11, 2008

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD., Plaintiffs, *v.* MIRROR IMAGE INTERNET INC., XCELERA INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON, Defendants.	C.A. No. 18507-VCS

OPINION

Date Submitted: June 4, 2008
Date Decided: September 4, 2008

Thomas P. McGonigle, Esquire, Todd C. Schiltz, Esquire, WOLF BLOCK LLP, Wilmington, Delaware; Michael Paris, Esquire, William C. Nystrom, Esquire, NYSTROM BECKMAN & PARIS, LLP, Boston, Massachusetts, *Counsel for Plaintiffs.*

Jesse Finkelstein, Esquire, Brock Czeschin, Esquire, RICHARDS LAYTON & FINGER, Wilmington, Delaware, *Counsel for Defendants Xcelera Inc., Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson.*

STRINE, Vice Chancellor.

I. INTRODUCTION

This opinion addresses several important issues in this case.

The first and most troubling is what consequences should attach when plaintiffs in a derivative action mislead the court about the reasons for their failure to take certain actions relevant to the case. The record reveals that a plaintiff who wished to have this court lift a stay that was in place pending the completion of a closely related arbitration made false representations of fact to this court about why it had failed to prosecute the arbitration on the schedule it had previously submitted to the court, claiming that it was "impossible" for the plaintiff to fund the arbitration because of a recent adverse financial development and suggesting that the plaintiff had not been aware of the size of the required arbitration filing fee. As discovery has revealed, those factual claims were false. The plaintiff had known about the size of the required filing fee for a long time and had sufficient funds to initiate and prosecute the arbitration. But, desiring to have this court reverse its prior decision to stay this case until the arbitration was completed, the plaintiff attempted to have the court believe that the plaintiff was too impoverished to prosecute the arbitration and allow this case to move forward first. In essence, the plaintiff sought to have a motion for reargument granted, but not by way of proper argument, but instead on the basis of a misleading recitation of the facts. In this opinion, I conclude that an order of dismissal is the only fitting remedy for this misconduct. When a party knowingly misleads a court of equity in order to secure an unfair tactical advantage, it should forfeit its right to equity's aid. Otherwise, sharp practice will be rewarded, and the tradition of civility and candor that has characterized litigation in this court will be threatened.

Second, I conclude that, in any event, the plaintiffs do not have derivative standing. One of the plaintiffs did not own stock at the time of two of the transactions it challenges and thus lacks standing as to those claims. And, as to its other claims, that plaintiff lacks standing because it sold off any economic interest in the company on whose behalf it is putatively suing during the course of this litigation, leaving itself an empty holder without any economic interest in the corporation. Given that reality, the public policy purpose behind the continuous ownership rule requires a finding that this plaintiff lacks standing. There are well-founded concerns about the agency costs of derivative suits in general, given the small stakes that many plaintiffs have. To permit a party to act as a derivative plaintiff when it has emptied itself of any economic interest in the corporation would invite abuse of the representative litigation mechanism, undermining its credibility and its utility in enforcing high standards of fiduciary conduct.

As to the other plaintiff, it has not been a stockholder since late 2002, when it was cashed out in a reverse stock split. The year 2008 is already more than two-thirds gone, and the plaintiff has never taken any steps to challenge the propriety of the reverse split and is thus time-barred from doing so. Since that plaintiff is no longer a stockholder, it lacks standing to serve as a derivative plaintiff.

In the remainder of this decision, I find that the plaintiffs are not adequate derivative plaintiffs for the same reason that I granted dismissal, which is that they knowingly misled the court about a material matter and are not fit to serve in a representative capacity. I also quantify the amount the plaintiffs owe to the defendants for their prior improper refusal to respond to discovery.

II. THE PARTIES

This case is a period piece of sorts that centers on a small Internet company, Mirror Image Internet, Inc.. The plaintiffs were stockholders in Mirror Image and feel aggrieved by another investor, defendant Xcelera.com, Inc., who the plaintiffs believe shunted them aside and usurped for itself the chance all Mirror Image stockholders deserved to ride the soon-to-burst Internet bubble of 1999.

A. THE PLAINTIFFS

After extensive discovery during the last two years, much more is known about the plaintiffs in this case than was known when the court addressed this case on previous occasions.[1] The plaintiffs have functioned as a unit during this litigation for a reason I will soon detail. The original plaintiffs in the cases were Plenteous Corp.; Parfi Holding, AB; Gunnar Gillberg; and Grandsen, Ltd. At their request, Gillberg and Grandsen were dismissed as plaintiffs in 2005.

Plaintiff Plenteous Corp. ("Plenteous") is a Panamanian corporation and was a minority shareholder in Mirror Image at the time of the transactions at issue in this case. Since November 2002, Plenteous has not been a stockholder of Mirror Image, having been cashed out in a reverse stock split. The owner of Plenteous is a company called Meillor Establishment, which in turn is owned by the Florentis Foundation, a foundation set up to be used as a personal family estate planning vehicle for Atle Lygren ("Lygren"). Lygren dominates and controls Plenteous, and uses its funds as he wishes to meet his personal needs and desires.[2]

---

[1] This case, which is very old by the standards of this court, has already generated four reported judicial decisions: *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211 (Del. Ch. 2001) ("*Parfi I*"), rev'd, 817 A.2d 149 (Del. 2002) ("*Parfi II*"); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245 (Del.Ch.2004) ("*Parfi III*" or the "Stay Order"); *aff'd in part, rev'd. in part*, 926 A.2d 1071 (Del. 2007) ("*Parfi IV*").

Plaintiff Parfi Holding, AB is a Swedish corporation and a minority shareholder in Mirror Image. The plaintiffs told the court in their complaint that Parfi was the "successor-in-interest" to Mirror Image Internet AB ("Mirror AB"), the Swedish former parent corporation of Mirror Image. But that turns out not to be literally true. Mirror AB was founded in 1996 by Sverker Lindbo ("Lindbo"), who has been one of its directors ever since.[3] Mirror Image was incorporated in Delaware as a subsidiary of Mirror AB in May 1997. In May 1999, Mirror AB changed its name to Drax Holding AB. On October 14, 1999, Drax sold its "business" and assets to Parfi, but that transaction did not cover Drax's shares in Mirror Image.[4] Confusingly, however, the transaction appears to have contemplated that Parfi would acquire whatever litigation rights Drax had relating to Mirror Image.

---

[2] *See, e.g.*, 09/12/05 Tr. at 46, 55:

> Lygren: "I [act on behalf of Plenteous] on the basis of a power of attorney that has been issued to me ... I have control to make Plenteous take the decisions that are within the scope of my authority. Plus, obviously since I was the one who formed the estate ... I can influence what the foundation eventually decides to do. ...
>
> Q. ... you have directed not only the expenditures but also the investment strategy of Plenteous over the last 10 years? A. That's correct."

See also Lygren Dep. at 22-24; Gillberg Dep. at 86 ("Yeah, Atle is the person behind Plenteous.").

[3] *See* Lindbo Dep. at 6-7.

[4] *See* Macdonald Aff. Ex. 5

In a later transaction, Parfi — whose stockholders consisted of many but not all the previous stockholders of Mirror AB, and not in the same ownership percentages — acquired the shares of Mirror Image that Drax owned for the nominal consideration of one Swedish kroner, or about twenty U.S. cents. Indeed, it appears that Parfi raised capital by convincing previous stockholders in Mirror AB and new investors that they could reap large benefits if litigation relating to Mirror Image was successful.

The various plaintiffs bound themselves together by a Joint Prosecution Agreement (the "JPA") on October 28, 1999.[5] The JPA, whose signatories include various shareholders of Mirror Image, was created for the purpose of conducting litigation proceedings in Delaware and in Sweden. Through the JPA, the plaintiffs allocated responsibility for litigation costs to a "Consortium" and also rights of recovery, including, rather oddly, rights of recovery as to derivative claims that might be asserted on behalf of Mirror Image. It also served a similar function for the efforts of the Consortium members to obtain relief in arbitration in Sweden.[6]

Oddly, the plaintiffs appear to have sought out investors who were not Mirror Image stockholders and asked them to buy into the Consortium, so as to profit from litigations and arbitrations related to Mirror Image.

B. THE DEFENDANTS

Nominal defendant Mirror Image is a Delaware corporation involved in designing technology to speed information retrieval and transmission across the Internet. As noted above, Mirror Image was formed in 1997 as a Delaware subsidiary of Swedish-based Mirror AB.

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[5] *See* Macdonald Aff. Ex. 6.

[6] Pursuant to the JPA, "[a]ny judgment or settlement obtained in the Swedish or Delaware action would be allocated among the parties to the JPA by the allocation mechanism of the JPA." JPA Section 9. *See also* Lindbo Dep. at 121-128.

Defendant Xcelera is a Cayman Islands holding company. Xcelera has been Mirror Image's majority shareholder since 1999, and it continues to control Mirror Image.

Defendants Alexander M. Vik, his brother Gustav M. Vik, and Hans Magnus Fajerson have been, at all relevant times, members of the boards of both Xcelera and Mirror Image. Additionally, the majority shareholder of Xcelera is an entity called Vik Brothers International, which is controlled by Alexander and Gustav Vik's father.

III. FACTUAL BACKGROUND

The factual background of this case has been described in depth in the opinions previously issued by this Court and the Delaware Supreme Court.[7] I will therefore give a truncated version.

The basic story goes like this. Mirror AB gave birth to Mirror Image but did not have sufficient capital to nurture it to the status of a successful, thriving public company. Although Internet companies were hot in the late 1990s and Mirror Image had an interesting product concept,[8] "Mirror Image required frequent infusions of capital to stay operational. Mirror AB could not, on its own, meet the financing needs of its subsidiary. By 1999, Mirror AB had to seek outside investors who could provide enough funds so that Mirror Image could meet its short-term obligations and stave off bankruptcy."[9]

---

[7] *See supra* note 1.

[8] Since its inception, Mirror Image has been engaged in the development of technology designed to enhance the speed of information retrieval and transmission across the Internet. *See* Am. Compl. at 7.

Although Mirror AB's leader, Sverker Lindbo, had incorporated Mirror Image in Delaware in 1997 with a goal of going public again, he looked to his homeland, Sweden, for new equity investors when Mirror AB could no longer shoulder the load. That is when Xcelera and Plenteous came on the scene. In March 1999, Mirror Image, Xcelera, and Plenteous entered into an agreement (the "Underwriting Agreement").

The Underwriting Agreement provided that Mirror Image would receive a total of $2 million in capital and that Xcelera and Plenteous would purchase a certain number of shares of Mirror Image stock at a predetermined price.[10] Specifically, the Underwriting Agreement provided that Xcelera and Plenteous would subscribe to 3,876 shares of Mirror Image stock at $516 per share, the subscription to be allocated between Xcelera and Plenteous by a 7-to-1 ratio. The Underwriting Agreement also allowed certain individuals to subscribe to 875 shares of Mirror Image stock, shares which would be issued from the subscription allocations to Xcelera and Plenteous and apportioned according to their relative positions. The subscription was divided into three parts. In the first tranche, Mirror Image would receive $1 million in capital from Xcelera ($875,000) and Plenteous ($125,000), in exchange for providing Xcelera and Plenteous 1,696 and 242 shares respectively. This first tranche game Xcelera nearly 50% of the vote. In the second tranche, the individuals mentioned above could subscribe. In the third tranche, the balance of the total subscription would be issued to Xcelera and Plenteous for payment of the remaining $1 million. Pursuant to the Underwriting Agreement, Xcelera would have owned over 60% of the shares once all the contemplated shares were issued. The Underwriting Agreement also gave Xcelera, Plenteous, and Mirror AB the right to appoint the new Mirror Image board, with Xcelera and Plenteous having most of the appointees. But, the plaintiffs claim that Xcelera, which placed four of its representatives, defendants A. Vik, G. Vik, and Fajerson, as well as Tryggwe Karlsten, on the five-person board, soon seized sole dominion for itself over the company's direction. Importantly, as things turned out, the Underwriting Agreement provided that any dispute, controversy, or claim "arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration" in Sweden.[11]

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[9] *Parfi II*, 817 A.2d at 151.

[10] The rather confusing terms of the Underwriting Agreement are detailed more fully in *Parfi I*, 794 A.2d at 1217-18.

The relationship among the parties deteriorated soon after the Underwriting Agreement closed. According to the plaintiffs, Xcelera immediately began to use its control of Mirror Image for improper purposes. Specifically, the plaintiffs further allege that the third tranche contemplated in the Underwriting Agreement never took place, but that instead, once Xcelera had control of Mirror Image, it initiated a series of transactions (the "Challenged Transactions") that it claims were designed to benefit Mirror Image, but which the plaintiffs contend were designed as a scheme to dilute their minority interest unfairly and to secure for Xcelera all of Mirror Image's upside.[12]

This process of value extraction was supposedly initiated by the "April and July 1999 Subscriptions."

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[11] *Parfi I*, 794 A.2d at 1217 (quoting the Underwriting Agreement § 20.2); *Parfi II*, 817 A.2d at 151 (same).

[12] See *Parfi I*, 794 A.2d at 1218; *Parfi II*, 817 A.2d at 152.

These were stock offerings that were supposedly done without proper board authorization and on very short notice at an unfairly low price. According to the plaintiffs, the now Xcelera-dominated Mirror Image board required that Mirror Image stockholders wishing to subscribe to these offerings do so on unreasonably short notice with the intent of ensuring that all of the new shares issued would go to Xcelera at a bargain price.[13] When these Subscriptions closed, Xcelera had purchased the full slugs of shares offered and increased its ownership interest in Mirror Image to 91.8%.

The next step in the scheme supposedly was for Xcelera — which was a public company trading on the American Stock Exchange — to exploit its control of Mirror Image to pump up Xcelera's own value and stock price. Thus, the plaintiffs allege that in the November 1999 preferred stock offering ("the Preferred Stock Offering"), the Mirror Image board authorized a private placement of convertible preferred stock in such a way that, once again, only Xcelera could invest. Like the previous common stock subscriptions, the Preferred Stock Offering was supposedly priced to advantage Xcelera and injure Mirror Image. Even worse, the Preferred Stock Offering was designed to give Xcelera, but not other Mirror Image stockholders, the chance to capitalize on a strategic alliance between Mirror Image and Hewlett-Packard. The strategic alliance involved a $32 million investment in Mirror Image by HP. Xcelera purchased the new Mirror Image preferred stock before the public was told about the HP investment. After Mirror Image announced the

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[13] The plaintiffs also alleged that Xcelera did not honor promises to keep Lindbo on as CEO by engaging in improper behavior that led to his resignation and by failing to seat a director named by Plenteous.

HP investment on December 21, 1999, Xcelera's stock price shot up almost 240 percent, from $67 per share to $160 per share.

Finally, the plaintiffs complained that Xcelera then used its ownership of virtually all of the equity of Mirror Image to usurp a corporate opportunity belonging to Mirror Image itself. In March 2000, Exodus Communications, Inc. agreed to purchase over 32 million shares of Mirror Image for $75 million in cash and over 3 million shares of Exodus stock (the "Exodus Transaction"). Exodus allegedly paid 75% of the combined value of cash and stock directly to Xcelera in exchange for Mirror Image shares owned by Xcelera, leaving Mirror Image itself with only 25% of the gains. The plaintiffs claim that in structuring the deal this way, Xcelera usurped a corporate opportunity belonging to Mirror Image.

The plaintiffs were not pleased by the Challenged Transactions, as is made clear by the fact that they executed the JPA in October 1999.

They struck first in Sweden, where Drax and Plenteous brought claims against Xcelera in Sweden before a three-person arbitration panel (the "Swedish Arbitration"). Drax, however, appears to have sold any right to its share of the recovery to Parfi. In November 2000, the plaintiffs then filed this suit in the Court of Chancery alleging numerous claims based on the Challenged Transactions. The factual allegations in the Delaware case were taken largely from the statement of claim in the Swedish Arbitration.[14]

From the get-go, the plaintiffs realized that they faced a substantial question about whether they could proceed in the Court of Chancery given the breadth of the arbitration clause in the Underwriting Agreement and, even more important, their own interpretation of that Agreement. In the Swedish Arbitration, the plaintiffs alleged that an enforceable "assumption" of the parties to the Underwriting Agreement was that Xcelera would not use its control of Mirror Image to unfairly dilute Mirror Image's minority stockholders.[15] The plaintiffs also argued that Xcelera had agreed not to dilute the percentage ownership of the minority stockholders while Xcelera and the minority looked for a permanent funding source for Mirror Image. The plaintiffs sought to hold Xcelera liable in the Swedish Arbitration for the alleged breach of these assumptions. Likewise, the plaintiffs sought a finding that Xcelera was liable for the Preferred Stock Offering and the Exodus Transaction, arguing that the latter transaction was structured to divert an opportunity from Mirror Image to Xcelera. In essence, the plaintiffs argued that the Underwriting Agreement incorporated, as a contractual commitment, the protections afforded by Delaware fiduciary duty law, and sought a liability determination based on that argument.

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[14] For a discussion of all claims asserted by the plaintiffs in their original complaint, *see Parfi I*, 794 A.2d at 1221-22, 1228-39.

The discovery record has now revealed that the plaintiffs' U.S. counsel was concerned from the outset that the plaintiffs might be ordered by this court to arbitrate all of its claims, since the claims in the Swedish Arbitration involved not only the same conduct as was involved in the Delaware claims, they also involved the same theory of unfair dilution.[16] Moreover, it also appears that, from the outset, the Swedish Arbitration was intended in some measure as a way to clear the way for litigation in Delaware, with the belief that a determination that the Underwriting Agreement was induced by fraud would relieve the plaintiffs of the obligation to arbitrate their claims.[17] Perhaps for that reason, the plaintiffs walked a two pound test line in the Swedish Arbitration.

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[15] *Parfi I* detailed the arguments made by the plaintiffs to the Swedish Arbitration Panel. 794 A.2d at 1223-25.

[16] *See, e.g.*, Macdonald Aff. Exs. 10, 13, 14; Nilsson Dep. at 19-20; Defs.' Supp. Br. at 4 (citing evidence to this effect).

While telling the Arbitration Panel that Xcelera had contractually promised them that it would not unfairly dilute them, the plaintiffs also asked the Arbitration Panel to avoid making any determination whether Xcelera had breached fiduciary duties under Delaware law. By this means, the plaintiffs could potentially get a positive ruling on the unfair dilution issue, while leaving open the chance to try the same theory over again in Delaware under the fiduciary duty rubric.

It therefore was not a surprise to the plaintiffs when the defendants promptly moved to dismiss or stay the Delaware action pending completion of the Swedish Arbitration. Before that motion was decided, the Swedish Arbitration Panel issued its ruling on the claims before it. In the main, the Arbitration Panel found for Xcelera and against Plenteous and Parfi. Thus, the Panel rejected the idea that the parties to the Underwriting Agreement had contracted on the assumption that Xcelera would not cause Mirror Image to raise capital in the near future in a way that would dilute the minority stockholders further. The Panel also held against Parfi and Plenteous as to their arguments that Xcelera denied their representatives, Lindbo and Lygren respectively, certain managerial roles at Mirror Image.

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[17] *See, e.g.*, Macdonald Aff. Ex. 64; Nilsson Dep. at 13-20; Lygren Dep. at 34-36; Defs.' Supp. Br. at 4-7 (citing evidence to this effect).

Importantly, the Panel also refused to opine on whether there had been any "unfair dilution," stating:

> The Claimants have explained that by dilution they mean only "unfair" dilution, not any such dilution as will inevitably occur by an issue of shares in which the minority shareholders do not participate. In the understanding of the Tribunal the distinction between fair and unfair dilution can absent express agreement be drawn only with reference to applicable company law. It can be said that any agreement resulting in some lasting relation between the parties thereto is premised on the assumption that the other party or parties will in the future behave within the limits of the law. Such assumption does not, however, trigger legal remedies different from those which follow from the application of the relevant law. In this case it is accordingly for the Courts of the State of Delaware to determine whether there was "unfair" dilution and what the legal consequences may be. The Tribunal cannot find that any particular assumptions regarding dilution relevant to this arbitration have been proved.[18]

In one important respect, however, the Arbitration Panel ruled against Xcelera. Plenteous succeeded on a claim that it had made a side arrangement with Xcelera whereby Xcelera would seek Plenteous's consent before taking any "corporate actions."[19] The Arbitration Panel determined that the April and July Subscriptions were such actions taken without Plenteous's consent, and held that Plenteous was entitled to damages for any resulting dilution in their interest in Mirror Image. But the Panel rejected the arguments that the HP or Exodus Transactions implicated Plenteous's consent rights and found for Xcelera on those points.

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[18] *Parfi III*, 842 A.2d at 1252 (quoting the Panel's ruling).

[19] *Id.* at 1252-53.

Eventually, I dismissed this action, finding that the plaintiffs' claims in this case fell within the reach of the broad arbitration clause within the Underwriting Agreement.[20] On appeal, the Supreme Court reversed this court's decision in 2002, allowing the plaintiffs to bring their breach of fiduciary duty claims in Delaware despite the close identity between those claims and the contractual "unfair dilution" claims the plaintiffs pressed in the Swedish Arbitration.[21] The case was therefore remanded back to this court in November 2002.

Aside from filing an amended complaint in January 2003 (the "Amended Complaint"), the plaintiffs did little to move this case along other than to substitute in new out-of-state counsel and ask the defendants for an extension of the schedule. In October 2003, the defendants moved in this court to enjoin a resumption of the Swedish Arbitration so that the plaintiffs would not have "two bites at the apple by seeking damages from the Arbitrators arising out of the same transactions that the plaintiffs are attacking in this court."[22]

That motion was precipitated by a September 2003 letter sent by the plaintiffs' Swedish counsel in the Arbitration to Xcelera's Swedish counsel, in which

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[20] *See Parfi I*, 794 A.2d at 1222-28.

[21] *See Parfi II*, 817 A.2d at 155-60.

[22] *Parfi III*, 842 A.2d at 1247.

Plenteous claimed payment of compensation for damages in the amount of approximately $569 million for Plenteous's dilution as a result of the Challenged Transactions. Under Swedish law, before Plenteous could recover from Xcelera in damages in arbitration, it had to quantify its damages demand and give Xcelera a chance to satisfy that demand voluntarily. Once Xcelera refused to pay, Plenteous was free to initiate a damages phase of the arbitration against Plenteous (the "Damages Phase") with the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"). The cost of doing so included the obligation to make an advance payment that was calculated as a percentage of the damages being asserted in the Damages Phase.

After Xcelera received Plenteous's demand and refused to pay the $569 million damage demand, the defendants moved to enjoin resumption of the Swedish Arbitration. The defendants argued, with a substantial basis, that Plenteous was seeking to recover exactly the same damages that it was seeking in this court. Moreover, the defendants pointed out that the plaintiffs had suggested to this court and the Supreme Court that they would not be seeking damages in Arbitration, but instead only in this court. Not only that, the plaintiffs had previously argued before this court and in the Supreme Court that the Exodus Transaction had no plausible connection to the Underwriting Agreement and claims in the Swedish Arbitration.[23] Thus, the defendants, with some substantial justice, took umbrage at being confronted with a demand that Xcelera pay $569 million in arbitral damages, a number that was calculated in substantial measure by reference to the shares Plenteous would supposedly had been able to sell to Exodus in Xcelera's place had its approval rights been honored. The defendants argued that the plaintiffs had, by their own conduct, made plain what they had previously denied, which is that all their claims were so inextricably bound together that they should be required to prosecute them in a single forum. Because the plaintiffs suggested to the Supreme Court that this court was their chosen forum, the defendants wanted an injunction against further proceedings in Sweden.

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[23] *Parfi I*, 794 A.2d at 1225-26; *Parfi II*, 817 A.2d at 159 n.37 (citing record showing that this was the case).

After considering the parties' positions on the motion, I did something neither requested. Respecting the Supreme Court's previous decision that the plaintiffs were entitled to split their contractual claims and fiduciary duties claims and press them in different forums, I refused to enjoin the Damages Phase.[24] But, recognizing the substantial overlap between what was sought in the Arbitration and what was sought in this case, and the need to avoid inconsistent judgments and a double recovery, I decided that what was further along ought to be finished as the first order of business.[25]

That is, because the Swedish Arbitration Panel had already decided the merits of the liability claims made in the original Arbitration, it seemed sensible that the first order of business ought to be the completion of that Arbitration. By that means, I would know what the outcome was before hearing the merits of this case and there was the potential that the damages awarded in the Damages Phase would satisfy Plenteous, or that the imminency of a damages proceeding would lead to a settlement in part or in whole. In so deciding, I expressly rejected as inequitable and inefficient the plaintiffs' fallback concession,[26] which was an offer to not complete the Arbitration until the Chancery case was concluded. Instead, I stayed the Delaware action on February 12, 2004 pending completion of all proceedings in the Swedish Arbitration, including the Damages Phase and the expiration of any right to seek review of the arbitral tribunal's final judgment.[27]

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[24] *Parfi III,* 842 A.2d at 1259-63.

[25] *Id.*

As discovery has revealed, the plaintiffs – and in particular Plenteous' singular controller, Atle Lygren – were not pleased by my decision.[28] They perceived that the Swedish Arbitration Panel might feel some inhibition in awarding over a half-billion dollars in damages.[29] Moreover, the Stay Order interfered with the plaintiffs' original goal, which was simply to use the arbitration tactically to obtain a declaration that the Underwriting Agreement was invalid and that its arbitration clause was null and void, and to obtain a liability determination that Xcelera had breached that Agreement.[30] By this tactic, the plaintiffs hoped to clear the way for litigation in a U.S. court and exert leverage over the defendants. In fact, they anticipated that after the initial liability arbitration in Sweden, there "would be no more litigation in Sweden."[31] But they wanted the flexibility to go back to Sweden for damages as a last resort if things did not go their way in the United States, and Swedish law gave Plenteous a full decade after the initial Panel ruling to initiate the Damages Phase of the Arbitration before being time-barred. Thus, when the Stay Order issued and this action was put on hold until the Arbitration process was completed, Lygren felt that this court had deprived the plaintiffs of "[their] rights under Swedish law."[32]

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[26] The plaintiffs' preference was to have the option to prosecute this case and the Swedish Arbitration simultaneously, subjecting Xcelera, at the plaintiffs' sole option, to a dual set of proceedings over the same Challenged Transactions.

[27] *Parfi III*, 842 A.2d at 1259-63.

[28] *See, e.g.*, Macdonald Aff. Ex. 32.

[29] *See, e.g.*, Macdonald Aff. Ex. 10 (advice of plaintiffs' U.S. counsel to plaintiffs in 2000).

[30] *See, e.g.*, Macdonald Aff. Ex. 64; Nilsson Dep. at 15-16.

[31] Nilsson Dep. at 16.

The Stay Order also came down at a time when the plaintiffs were changing primary litigation counsel in this case. Their prior counsel, Brown Rudnick, wished to withdraw because they were owed $300,000 in past fees. New counsel, Lieff Cabraser Heimann & Bernstein, had come in on a contingency basis shortly before the Stay Order to represent the plaintiffs in this case. But, Lieff Cabraser had not agreed to represent the plaintiffs in the Swedish Arbitration at all, much less on a contingency fee basis.

After the Stay Order was entered, the plaintiffs did little, if anything, to institute the Damages Phase. The plaintiffs had European counsel who had worked with them on the Liability Phase of the Arbitration. The plaintiffs knew that, given the $569 million damage demand, the advance fee for initiating the Liability Phase would be substantial, and could be as much as "EURO 806,000, plus VAT".[33] Their European counsel had worked for them, it appears, on an hourly rate basis.

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[32] Macdonald Aff. Ex. 32.

[33] *See*, for example, the explanation of the plaintiffs' Swedish counsel on June 2, 2004. Macdonald Aff. Ex. 38 ("In addition to hav[ing] incurred expenses covered, the three arbitrators may together charge between approximately EURO 187,000 and approximately EURO 806,000, plus VAT if required by law ... Said am-

Because the plaintiffs really wanted to proceed in Chancery, did not believe they would do as well in arbitration, and did not wish to foot the costs of the Arbitration, they did nothing substantial to get the Damages Phase moving. This is not to say that they did nothing at all; they did have their Swedish counsel, Olof Nilsson, do some very preliminary work. In that regard, the plaintiffs were, as noted, advised by Nilsson of the approximate filing fees that would be required by the SCC to initiate the Damages Phase, an estimate that made it plain that it could cost over a half million dollars.

But the serious work of preparing the necessary papers to actually initiate the Damages Phase and to get it going was not begun in earnest. Rather, what the plaintiffs devoted the most energy to was trying to cajole Lieff Cabraser into handling the Damages Phase of the Arbitration for a contingency fee. Lygren engaged in animated communications with Lieff Cabraser arguing that they owed the plaintiffs a duty to do that or to somehow get this court to lift the Stay Order.

Consistent with its case management practices as to all cases, including ones subject to a stay, on June 28, 2004 this court required the parties in this case to provide a status report in advance of the then traditional annual call of the calendar. That report was provided by the plaintiffs on August 6, 2004, and stated that the "[p]arties are in the process of initiating" the Damages Phase "and will advise the Court as soon as a schedule can be obtained from the Arbitration Panel."[34]

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ounts are approximated on basis of the currency conversion rate (USD to EURO) as of today."); Nilsson Dep. at 67, 69.

[34] Macdonald Aff. Ex. 41.

At the September 13, 2004 call of the calendar over a month later, the plaintiffs could not inform the court of the status of the Swedish Arbitration. That was not a satisfying response because over half a year had elapsed since the Stay Order, and it appeared that the plaintiffs had not even taken the formal steps necessary to initiate the Damages Phase. The court made plain that it expected the plaintiffs to move with alacrity for an obvious reason: if the plaintiffs dallied in finishing the Arbitration, they would delay the completion of this litigation, and thereby cause the sort of inefficiency and unfairness that often results when cases are tried long after the relevant events in question transpired.[35] To make sure that this sort of injustice would not result in this case, the court ordered the plaintiffs to supply a detailed written status report on or before September 27, 2004, setting forth whether an arbitration panel had been convened, the expected timeline for arbitration, and any other details that were available concerning the Swedish Arbitration. On September 23, 2004, I received a letter from the plaintiffs' U.S. local counsel and an attached letter from the plaintiffs' Swedish counsel, advising that Swedish counsel "have been in the process preparing Plenteous' case in full detail prior to the initiation of arbitration proceedings," that Plenteous had already selected its arbitrator for those proceedings, and that Plenteous anticipated making a formal request for arbitration, which would result in the convening of a full arbitration panel, on or before October 18, 2004.[36]

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[35] The plaintiffs' U.S. contingency counsel reported this development in a letter to the plaintiffs dated September 16, 2004, which stated:

> At the status conference on Monday, September 13, the Court expressed unhappiness with the lack of information being reported concerning the Swedish arbitration. The Court therefore stated that on or before September 27, 2004, the parties must supply the Court with a detailed status report, setting forth whether an arbitration panel has been convened, the expected timeline for arbitration, and any other details that are available concerning the Swedish arbitration. The detailed status report must be submitted by letter. The Court fully expects to learn more details from the parties by that date than that the arbitration is simply 'pending'. The Court stated that if it is not satisfied that the Swedish arbitration is being undertaken in earnest, then it is prepared to dismiss the Delaware litigation entirely.

Macdonald Aff. Ex. 43 (emphasis in original).

Contrary to the representations made to me by the plaintiffs, Plenteous did not make a formal request to initiate the Damages Phase by October 18, 2004.[37] Instead, on October 27, 2004, I was informed by the plaintiffs' U.S. counsel that Plenteous had been "unable to initiate a formal request for arbitration as previously represented," and that "detailed declarations from both Plenteous and its Swedish counsel" regarding (1) the reasons why Plenteous had not initiated the Damages Phase and (2) Plenteous' next steps would be submitted "as soon as possible."[38]

On February 14, 2005 — over a year after the entry of the Stay Order — the defendants moved to dismiss this case for failure to prosecute. On February 18, 2005, the plaintiffs moved to lift the stay. In their motion to lift stay, the plaintiffs stated that "[f]iling the Damages Arbitration in Sweden will require an advance payment by Plenteous of approximately 395.200 EURO, or over $515,000," and claimed that "[c]hanged financial circumstances of Plenteous have rendered it *impossible* for Plenteous to pay the fee that is required to initiate and pursue the Damages Arbitration."[39] The grounds for the plaintiffs' motion were set forth in affidavits from Lygren and the plaintiffs' Swedish counsel Nilsson, both dated December 1, 2004, copies of which were attached to the motion.

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[36] *See* Macdonald Aff. Ex. 47.

[37] In fact, to date the Damages Phase has not been initiated.

[38] *See* Macdonald Aff. Ex. 59.

As to the inability of Plenteous to pay the fee, Lygren stated that due to a substantial decline in the value of stock held by Plenteous, "Plenteous no longer has the funds to initiate the Damages Arbitration (and pay the requisite advance fees) at this time."[40] Lygren claimed that this fact was not known to him when the plaintiffs reported to the court in September 2004.[41] Lygren also stated that the plaintiffs had not calculated the "exact advance fees to be charged by the Swedish Arbitration Tribunal" as of September 2004.[42]

Seeking to accomplish his long-standing desire to lift the Stay Order, Lygren continued:

> 25. Furthermore, Xcelera was de-listed from the American Stock Exchange prior to trading on November 15, 2004, last traded at 36 cents per share, and based on Plenteous' best knowledge, due to its having been tapped for hundreds of millions dollars, would not be able to satisfy a judgment in Plenteous' favor stemming from the Damages Arbitration.

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[39] *See* Paris Aff. Ex. 22 (emphasis added).

[40] *See* Macdonald Aff. Ex. 64.

[41] *Id.*

[42] *Id.*

> 26. For the foregoing reasons, Plenteous has not initiated the Damages Arbitration, nor can it afford to in the foreseeable future. Plenteous does not have the resources to raise the funds required to initiate the Damages Arbitration, which would necessarily only involve Plenteous and Xcelera as parties. Plenteous therefore requests that the stay in this action be lifted so that Plaintiffs may seek compensation from all the Defendants in this action.[43]

The affidavit of plaintiffs' Swedish counsel, Nilsson, also contained a similar statement.[44] It also suggested that the plaintiffs, when initiating the Swedish Arbitration in 2000 and afterwards, had never intended to proceed with the Damages Phase, stating that:

The Arbitration was limited to liability for two reasons: (i) the Arbitration was instigated in the first place pursuant to advice by Plenteous' US counsel to get a favourable ruling to support the US litigation, i.e. a ruling of substance that the underwriting agreement and the arbitration clause contained therein is invalid, because a ruling would avoid some otherwise possible procedural obstacles to the US litigation; and (ii) a quantified claim for compensation would be made in the US.[45]

The defendants were skeptical of the truthfulness of these affidavits, and the court itself had serious concerns about that issue. The defendants suggested that the plaintiffs had engaged in sharp tactics, delay, and games-playing that warranted dismissal of this case. Rather than dismiss the case, I ordered discovery into the question of whether the plaintiffs had engaged in sanctionable delay or made misrepresentations to the court.

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[43] *Id.* Although formally Plenteous and Xcelera would be the only parties to the Damages Arbitration, as a matter of economic substance, the parties to the JPA Consortium would also be "involved" because they shared an economic interest in the outcome of the Arbitration with Plenteous under the JPA.

[44] *Id.*

[45] Macdonald Aff. Ex. 64.

Immediately, the plaintiffs impeded the process by failing to produce the required discovery.[46] In May 2005, as briefing on the defendants' motion to compel was concluding, the plaintiffs' U.S. contingency counsel Lieff Cabraser moved to withdraw. Before that motion to withdraw was decided, I heard the motion to compel, granted it, and awarded sanctions in the form of attorneys' fees against the plaintiffs because they had no substantial basis to resist discovery.

Meanwhile, the plaintiffs vociferously resisted Lieff Cabraser's motion to withdraw. Given the sensitivity of that motion's basis, I appointed a special master to hear it. Following a lengthy proceeding before the special master, I adopted his recommendation to grant the motion to withdraw on April 3, 2006 and ordered the plaintiffs to obtain successor counsel by May 15, 2006 or their actions would be dismissed.[47] The deadline was set giving due consideration to the reality that the plaintiffs had known since early 2005 that Lieff Cabraser wanted to withdraw, had known since December 23, 2005 that the Special Master had recommended that the motion be granted, and had been encouraged by the court long before to get on with the process of identifying successor counsel.

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[46] This included refusing to provide any financial information on Lygren, despite his relationship with Plenteous.

[47] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 2006 WL 903578 (Del. Ch. Apr. 3, 2006). The plaintiffs' U.S. local counsel also moved to withdraw and her motion was granted. *Id.*

May 15 came without the entry of new counsel. Instead, the court received a call from lawyers from the firm of Nystrom Beckman & Paris, saying that they might enter an appearance but needed more time. The court was skeptical given how little new counsel had done to read the file and also wanted to make sure that new counsel did not enter and then seek to withdraw for a reason, such as the plaintiffs' financial condition or strategy for the litigation, which new counsel knew had been a subject of dispute between the plaintiffs and Lieff Cabraser. As to issues that were already in contention, the court wanted, in view of the lengthy history of the case, new counsel to recognize that the court would not permit withdrawal for reasons that were extant and known as of the time of their appearance. The court therefore gave the plaintiffs another sixteen days to have new counsel enter an appearance, or the case would be dismissed. Neither Nystrom Beckman & Paris nor any other counsel entered an appearance as counsel for Parfi and Plenteous by May 31, 2006. The prospective new counsel did not seek clarification from this court, to get assurance that they could seek to withdraw if a new ethical issue arose in the future regarding the case that was not known as of the date of appearance. An order of dismissal was then entered.

Rather than seek re-argument, new counsel then initiated an appeal. On appeal, most of the plaintiffs' argument attempted to convince the Supreme Court that the Stay Order was improper. The plaintiffs failed in that attempt.[48]

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[48] *Parfi IV*, 926 A.2d at 1074-76.

But, the plaintiffs were successful in arguing that this court's order requiring new counsel to make a non-withdrawable appearance was improper, insofar as it could prevent counsel from seeking to withdraw in a situation where counsel's ethical obligations required such a move. Thus, the Supreme Court lifted the dismissal order and remanded the case back to this court.[49]

After that, the discovery that the plaintiffs had improperly resisted was finally produced, and these motions were briefed. The defendants expanded their bases for seeking dismissal after discovery, having learned additional facts relevant to the standing of the remaining plaintiffs, Plenteous and Parfi. The defendants also sought an order quantifying the attorneys' fees and costs the plaintiffs must pay them in connection with the plaintiffs' prior failure to provide discovery. Meanwhile, the plaintiffs renewed their application to lift the Stay Order.

IV. LEGAL ANALYSIS

A. SHOULD THE CASE BE DISMISSED BECAUSE THE PLAINTIFFS MADE MATERIALLY MISLEADING STATEMENTS TO THE COURT IN ORDER TO OBTAIN RELIEF FROM THE STAY ORDER ON FALSE PRETENSES?

Although initially pressed primarily under the rubric of Court of Chancery Rule 41(e),[50] the defendants' motion to dismiss the entire case more properly falls under Rule 41(b)[51] as well as the inherent authority of this court to hold litigants responsible for misconduct in the litigation process.[52]

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[49] *Id.* at 1076-77.

[50] Court of Chancery Rule 41(e) states:

> Subject to the provisions of Rules 23, 23.1 and 23.2 in each cause pending wherein no action has been taken for a period of 1 year, the Court may upon application of any party, or on its own motion, and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given, or the parties have stipulated with the approval of the Court as to such matter.

Ct. Ch. R. 41(e).

As the plaintiffs point out, the use of Rule 41(e) to fault them for the failure of this litigation to proceed between the entry of the Stay Order on February 12, 2004 and February 18, 2005 would be odd precisely because the Stay Order was in place. Given that, the court itself would not have expected substantial progress in the Chancery case.

That is true, of course, but does not address the core problem. In a situation when this court stays its case until the plaintiffs complete prosecution of a related matter in another forum, this court is entitled to hold the plaintiffs accountable for prosecuting the related matter with due diligence. Otherwise, this court would face the prospect of trying its case at a time when memories have dimmed and there is a great hazard that the potential for error that always is present in human fact-finding about past actions will, combined with a less reliable record, result in an unjust result.

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[51] Court of Chancery Rule 41(b) states in pertinent part: "For failure of the plaintiff to prosecute or to comply with these Rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant...".

[52] *See, e.g., Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 159 (Del. 1970) ("The authority of the Superior Court to dismiss a plaintiff's action, for failure to prosecute or to comply with its Rules or orders, is clear. The power has its origins in the common law judgments of *non suit* and *Non prosequitur*. It is an inherent power of the Trial Court arising from the control necessarily vested in the Court to manage its own affairs and to achieve the orderly and expeditious disposition of its business. This power has been recognized by Sup. Court Civil Rule 41(b).") (footnote omitted).

Thus, when the plaintiffs' counsel could not even say six months after the Stay Order that the Damages Phase had been initiated, the court was concerned, as that kind of torpor in simply initiating the Damages Phase of the Swedish Arbitration did not bode well for the timely completion of that Arbitration, especially in view of the reality that the plaintiffs had barely moved forward in this litigation from the time of the Supreme Court's remand order in 2002 until the Stay Order was entered.

The plaintiffs clearly understood that the court expected to hear by September 27 that the steps necessary to get the Damages Phase moving forward had been or would shortly be taken.[53] That is precisely why the September 23 submission was at pains to make clear that the Damages Phase would be formally commenced no later than October 18, 2004. Notably, it was only after the court made its expectations clear that Swedish counsel began drafting the Request for Arbitration and a more developed Statement of Claim necessary to commence the Damages Phase.[54] This deserves emphasis. *The Request for Arbitration was necessary to commence the Damages Phase as was a completed Statement of Claim, and Nilsson was not even instructed to get these documents finalized until October.*

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[53] *See, e.g.*, Macdonald Aff. Ex. 45; Macdonald Aff. Ex.43.

[54] *See* Nilsson Dep. at 92 ("Q. So if I understand your testimony correctly, on October 13th you started drafting a request for arbitration and a more developed statement of claim and within one or two days you were instructed by Mr. Lygren to stop working on the arbitration, is that correct? A. Yes."); Macdonald Aff. Ex. 64 (Nilsson stating: "Upon receipt from the said gentleman [Lygren, Lindbo and Gillberg] on 13th October 2004 of additional information and evidence, we immediately started drafting a request for arbitration and a more developed statement of claim.").

The most problematic behavior that the court must address, and this is really the subject of the defendants' motion, came next. From the record, it is apparent that Lygren was still chafing under the Stay Order and desired to avoid its requirement that Plenteous finish the Arbitration process before proceeding in this court.[55] Although Lygren appears to have given thought to actually going through with the arbitration process, in mid-October 2004, Lygren made the decision that he would not do so.[56]

It is clear that his decision to cause Plenteous not to proceed was not based on the fact that it was impossible for Plenteous to do so. Rather, Lygren simply believed that the costs of doing so exceeded the probable benefits and he argued to his lawyers that they should tell the court that it was wrong to have entered the Stay Order and should reverse itself.[57] In fact, he told his lawyers that Plenteous was not incapable of funding the Damages Arbitration but that it had concluded that to do so was not a wise decision in view of the "alternative avenue" of litigating in Chancery "available to us."[58] But, he did not tell that version of events to the court.

Instead, when his lawyers pushed back and suggested that this sort of after-the-fact cost-benefit analysis was not likely to be a convincing explanation for not commencing the Damages Arbitration on October 18, 2004 as promised, Lygren came up with a story that was not only literally false, but designed to have the court reverse its Stay Order determination on false pretenses. Thus, only after previously telling his lawyers that it was not in Plenteous's interests on a cost-benefit basis to proceed with the Damages Arbitration and meeting with concerns by them that that explanation might raise concerns on the part of this court, Lygren provided input to a first draft affidavit of Nilsson with these words:

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[55] *See, e.g.*, Macdonald Aff. Ex. 51, 56, 57; Nilsson Dep. at 84.

[56] *See* Macdonald Aff. Ex. 55; Lygren Dep. at 158-159; Nilsson Dep. at 72-73.

[57] *See, e.g.*, Macdonald Aff. Ex. 50, 51, 56, 57.

[58] *See* Macdonald Aff. Ex. 57.

> It is not my statement to you that Plenteous does not wish to commence the Damage Arbitration but rather that at this particular moment in time it is not possible for Plenteous to commence it due to the costs involved.[59]

Thus, the impossibility story was invented and then submitted to this court. That story was based on the notion that Plenteous was a separate corporation whose distinct identity was entitled to respect[60] and for which it was literally "impossible" to muster the funds to proceed with the Damages Arbitration. This impossibility had supposedly arisen because Plenteous's sole "liquid"[61] assets were stock in a corporation called Apptix ASA, whose shares were listed on the Norwegian Stock Exchange and whose shares had come under severe pressure from a short-seller. Lygren told the court that he had only learned of that adverse development after the September 23 report was given to the court.[62] Lygren also purposely led the court to believe that the size of the fee required to initiate the Damages Arbitration was unexpected.

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[59] *See* Macdonald Aff. Ex. 60.

[60] The plaintiffs have pushed this line consistently in this court. *See, e.g*. plaintiffs' letter to Ct., Aug. 4, 2007 at 4; Pls ' [illegible] op. Br. at 27.

[61] This is the plaintiffs' term. *See, e.g*., Macdonald Aff. Ex. 64 ("the sole source of liquidity for Plenteous").

[62] *See* Macdonald Aff. Ex. 64.

The reality that emerges from the record is quite different. Lygren knew going into September that the fee required to initiate the Damages Arbitration was likely to be substantial. He had estimates in hand.[63] His reference in his affidavit to not having calculated the "exact" amount of the fee that would ultimately be payable is, I concede, so cute that it precludes being labeled a literal falsehood. What is obvious is that it was advanced to suggest to the court that the plaintiffs received, after their September 23 submission, an estimate of costs that was unexpectedly large. That suggestion was false.

Even more clearly false was that representation that it was "impossible" for Plenteous to fund the required filing fees (and for that matter, the prosecution of the Damages Phase). That was literally false for a couple of key reasons. The first is that Plenteous owned Apptix stock, which had a market value of $11.4 million as of October 19, 2004, and over which $4 million were unencumbered and free to be sold. The second is that Plenteous had other less liquid, but still substantial, assets, which a sophisticated businessman like Lygren would know how to use to generate cash. Lygren has not been very forthcoming about Plenteous's resources, but admitted that its resources were not limited to shares of Apptix.[64]

The third reason is that Plenteous had Lygren himself had sufficient resources to fund the Damages Arbitration. This fact might not be relevant if Plenteous were actually an adequately capitalized corporation that respected corporate formalities. But, that is not what it is. It is nothing more and nothing less than a personal tool that Lygren uses to hold his personal wealth. It does what he wants when he wants. Although the record regarding Plenteous has been difficult for the defendants to develop given Lygren's resistance to discovery into that question, one of the plaintiffs' own arguments is, ironically, the best way to prove the point that Plenteous and Lygren himself are entirely indistinct. According to the plaintiffs, one of the reasons that Plenteous was inhibited from selling a bloc of its Apptix stock in order to fund the Damages Arbitration was that a material portion of that stock was pledged to a bank.[65]

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[63] *See* Macdonald Aff. Ex. 38; Nilsson Dep. at 67, 69.

[64] As Lygren admitted during his deposition, Plenteous actually has many assets other than Apptix stock. *See* Lygren Dep. at 142.

As it turns out, however, pledge was in part attributable to Lygren's decision to have Plenteous give $1.3 million to himself in the summer of 2003. By that pledge, Plenteous relieved Lygren of a personal obligation to the bank in the amount of $1.3 million. That relief was provided to Lygren WITHOUT CONSIDERATION AND NO RECEIVABLE FROM LYGREN IS BOOKED AT PLENTEOUS.[66] With $1.3 million, Plenteous could have funded the entire filing fee and the costs for counsel to finish the Damages Phase of the Arbitration. In this regard, Lygren admits that he had, at all relevant times, sufficient funds to cover the costs of initiating the Damages Phase.[67] Put simply, the representation that it was impossible for Plenteous to fund the Damages Arbitration was clearly false and designed to influence the court into lifting the Stay Order on false pretenses.

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[65] *See* Pls.' Opp. Br. at 23.

[66] As is typical, the plaintiffs were vague about this. But, in a June 4, 2008 letter to the court, they essentially admitted that Lygren had caused Plenteous to assume $1.3 million debt for him without consideration and that this resulted in an encumbrance of some of the Apptix shares. The plaintiffs promised to provide more information if that was in fact not the reality and have failed to do so.

Similarly, it was not true that Lygren was unaware of downward pressure on Apptix stock as of September 20. He already suspected short-selling by a hedge fund in early September.[68] Indeed, the reference in his affidavit to a 50% stock drop is itself unclear in a way that seems advertent, because it does not explain that the price of Apptix had dropped from its high in August by almost 14% as of September 23, 2004 and by roughly 30% as of October 15, 2004. But even with that drop, by the time Lygren decided not to proceed with the Damages Phase, Apptix shares were at approximately the same price as they were when the Stay Order was entered.[69]

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[67] *See* Lygren Dep. at 150, 164-165; letter from plaintiffs' U.S. counsel to this court dated August 10, 2007 at 4 ("... Plaintiffs are prepared to stipulate that Mr. Lygren, had sufficient personal assets to fund the fees necessary to initiate and prosecute the damages phase of the Swedish Arbitration.") (emphasis in original).

[68] *See* Paris Aff. Exs. 82-89. I do not base this decision on the notion that Lygren was not genuinely concerned by movements in Apptix's stock price in autumn. He appears to have had a feisty dispute with HBK Investments, L.P., a large investor in Apptix, over whether it was engaged in short-selling. What I base my decision on is that nothing about that dispute made it impossible for Plenteous to fund the Damages Phase and that that dispute was not the reason Plenteous did not proceed. Instead, it was a pretext Lygren used as a false excuse to do what he had consistently desired since the entry of the Stay Order, to convince the court to lift that Order.

[69] The price of Apptix stock on October 15, 2004 was 13.00 NOK and was at 13.50 NOK on the day the Stay Order was issued, February 12, 2004. *See* Macdonald Aff. Ex. 74.

The plaintiffs also failed to share another reality with the court. Although Plenteous was the only successful party in the Arbitration, under the JPA others of the plaintiffs, including Grandsen and Gillberg, stood to share in any recovery in the Damages Arbitration. Furthermore, Gillberg was apparently prepared to fund his share of the costs, but was then met with Lygren's refusal to proceed.[70]

In the twenty-sixth paragraph of his affidavit to the court – which was echoed in paragraph three of the plaintiffs' motion to lift stay — Lygren implied that Plenteous was the only plaintiff with an interest in the Arbitration and therefore with an incentive to put its resources up to fund the filing fee.[71] In fact, others of the plaintiffs stood to share in any recovery by Plenteous, because the parties to the JPA-created Consortium had pooled their claims and were sharing on a percentage basis in any recovery by any Consortium member in the Swedish Arbitration. Although Plentous's share was very high, others stood to receive the rest.

The factual record is voluminous. But the underlying reality can be stated briefly. The genuine reason that the Damages Phase was not filed was that Lygren had never desired to proceed with his damages claim in Sweden, and preferred to litigate that question in this court, while reserving the option of resuming proceedings in Sweden if things did not turn out well here. Therefore, he spent most of his energy after the Stay Order was entered in an attempt to get his lawyers to do something to get the Stay Order lifted. Only when the court called the question at the call of the calendar did any work in earnest on the Damages Arbitration begin. And then Lygren quickly squelched it, not because it was impossible to proceed, but because he did not want to proceed, although there were adequate resources to do so.

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[70] *See* Gillberg Dep. at 9.

[71] *See* Macdonald Aff. Ex. 64.

Rather than being straight-forward with the court, Lygren concocted an affidavit designed to give the court a false impression that dire and unexpected financial circumstances precluded Plenteous from proceeding. That concoction was designed to get the court to lift the Stay Order, permitting Lygren and the other plaintiffs what they wanted all along, a chance to proceed first with the Chancery case and then, and only then, proceed to Damages Arbitration if necessary.[72]

I do not reach these factual conclusions lightly. I have reviewed the factual record carefully and come to the conclusion that there is clear and convincing evidence supporting my findings.[73] Indeed, the most compelling evidence consists of Lygren's own admissions and statements, which clearly support a finding that he conjured up a misleading story to give to this court for tactical advantage.

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[72] Although Lygren presented the share drop reasoning as the most important reason for Plenteous's October 15, 2004 decision not to initiate the Damages Arbitration, this reasoning is mentioned nowhere by him or others in (internal) correspondence and discussions about this issue in the record during the second half of October 2004. *See, e.g.*, Macdonald Aff. Ex. 57, 58, 60, 61. Only after Lieff Cabraser reiterated to Lygren at the end of October that simply informing the court that Plenteous did not desire to go forward with the Damages Phase and wanted a de facto reargument of the Stay Order would not likely be productive did Lygren shift course and start telling his counsel that it was impossible for Plenteous to proceed.

[73] *Smith v. Williams*, 2007 WL 21937448, at *4 (Del. Super. Ct. July 27, 2007); *see also Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989).

I agree with the defendants that this wrongful course of conduct implicates this court's authority under Rule 41(b), to dismiss a case when the plaintiffs fail "to prosecute" or "comply with" the court's rules or orders.[74] I also agree with them that it implicates this court's inherent authority to police the litigation process, to ensure that acts that undermine the integrity of that process are sanctioned.[75]

When this court requires parties to provide status reports, it obviously expects that they be intended to be accurate. The plaintiffs knew this, as their counsel made clear to them that the court was dissatisfied by the lack of substance provided at the call of the calendar and expected a thorough and accurate report by September 27, 2004. The plaintiffs also knew that the court had made clear that Plenteous had a duty to prosecute the Damages Phase diligently because this case could not proceed until the Arbitration was complete.

Having told the court on September 23 that the Damages Phase would be initiated no later than October 18, 2004 — a very specific representation — the plaintiffs were duty bound to explain themselves accurately and non-misleadingly when they then did not honor their prior representation. Instead of being candid, the plaintiffs gave the court a false and misleading account of their rationale.

At that juncture, candor might well have resulted in the plaintiffs receiving a liveable result. The plaintiffs could have told the court candidly that, as a matter of self interest, they had concluded it was not cost-effective to proceed with the Damages Phase of the Arbitration and that they wished to have the Stay Order lifted. The defendants might then have reasonably responded that the plaintiffs had to make an election, either proceed with the Damages Phase of the Arbitration immediately or agree to an order dismissing any claims made in the Arbitration with prejudice, pointing out that it was unfair to allow the plaintiffs to reargue the Stay Order well after the time for a Rule 59 motion had come and gone. Moreover, the defendants would have likely also said that it was no more fair for Xcelera to have the potential of a later, overlapping Damages Arbitration hanging over their head during this litigation at that late point than it was when the court originally entered the Stay Order. The court could then have grappled with the real issue in controversy based on a forthright submission by the plaintiffs.

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[74] Ct. Ch. R. 41(b).

[75] *See, e.g., Gebhart*, 264 A.2d at 159.

But instead, the plaintiffs tried to win the day by telling the court that Plenteous was impecunious and simply could not proceed. Admittedly, the plaintiffs did note that Xcelera's financial troubles made the potential benefits of the Damages Arbitration less attractive, but the key issue in their version of events was the "impossibility" of Plenteous proceeding in view of its supposedly singular interest in the Arbitration, its financial situation, lack of obtainable resources, and the unexpectedly high costs of filing for the Damages Arbitration. The plaintiffs thus tried to elicit the sympathy of the court based on a false and misleading story and obtain a tactical advantage over the defendants.

In my view, this sort of behavior can only be met with the admittedly harsh sanction of dismissal. The integrity of the litigation process is fundamentally undermined if parties are not candid with the court. Parties have every right to file motions for reargument or to suggest that a prior course of case management be altered in light of changed circumstances. Judges are humans and by definition susceptible to error, and changed circumstances often justify a different approach to case scheduling.

But when a party fails to comply with its prior representation to the court and seeks an alteration in a prior court order it did not like, its explanation for changing course should be straight-forward, not intentionally misleading. This is not a novel thought. Under both the decisional law of this state, that of other states, and that of the federal courts, the importance of candor to the tribunal is well-recognized.[76]

When a party makes materially misleading statements to the court in order to gain an advantage, a court has "clear" authority to dismiss a plaintiff's action for failure to comply with its Rules.[77] This "is an inherent power of the Trial Court arising from the control necessarily vested in the Court to manage its own affairs and to achieve the orderly and expeditious disposition of its business."[78] This authority is consistent with the U.S. Supreme Court's interpretation of the inherent authority of federal courts to sanction bad-faith conduct, especially when the court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled."[79] Moreover, the Court of Chancery Rules specifically authorize stringent sanctions where parties have committed fraud on the court. Rule 60(b) authorizes the court to "set aside a judgment for fraud on the court" in the interests of "the integrity of the judicial process."[80]

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[76] *See, e.g., Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1944) ("[Lack of candor] is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."); *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999) ("Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process.").

[77] *Gebhart*, 264 A.2d at 159.

[78] *Id.; see also Smith v. Williams*, 2007 WL 21937448, at *3 ("[T]he Court is necessarily accorded considerable latitude in dealing with serious abuses of the judicial process.").

To permit the plaintiffs to proceed would, by example, encourage other parties to play fast and loose with the truth when speaking to this court.[81] Moreover, lesser sanctions are awkward at this point. Because of the plaintiffs' overall lack of diligence, including doing virtually nothing between the time of the original remand order and the Stay Order, their long-running battle with Lieff Cabraser, and failure to earlier secure successor counsel, it is now eight years after the Challenged Transactions occurred. Although it would be possible, I suppose, to impose the burden of persuasion as to every issue on the plaintiffs, and to give the defendants the nod on any issue as to which there is doubt due to the passage of time, I do not believe that sanction, which would be awkward to administer, would be serious enough, given the false representations made to the court.[82] Rather, I believe this situation to justify the entry of a dismissal. When plaintiffs come to this court seeking equity, they are expected to do equity by the other parties to the case and to the court itself, by being candid.[83] The plaintiffs here have forfeited their right to equity by their own inequitable conduct.[84]

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[79] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *see also Aoude*, 892 F.2d at 1118 ("It strikes us as elementary that a federal district court possesses the inherent power to deny the court's processes to one who defiles the judicial system by committing a fraud on the court.").

[80] *Credit Lyonnais Bank v. Pathe Commc'ns Corp.*, 1996 WL 757274, at *1 (Del. Ch. Dec. 20, 1996).

[81] I suppose the cynical would say that parties mislead courts all the time and that therefore this sort of gamesmanship is not extraordinary enough to justify dismissal. But if in fact misleading statements to courts are in fact common, a notion I choose not to embrace, it is even more important that strong sanctions be imposed when a party's misleading statements are exposed.

The dismissal order will dispose all of the plaintiffs' claims, whatever their nature (i.e., direct or derivative).[85] For the sake of completeness, however, I will also address the defendants' claims that the plaintiffs lack standing and do not qualify as adequate derivative plaintiffs.

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[82] If I were to have to shape an alternative remedy, it would involve at least the following elements: 1) burden-shifting and evidentiary presumptions of the type outlined; 2) a requirement that the plaintiffs pay the defendants' attorneys fees for litigating the motions now before the court; 3) dismissal of the claims in the Swedish Arbitration with prejudice; and 4) payment of Xcelera's attorneys fees incurred in defending the abandoned Swedish Arbitration.

[83] This arises from one of the principle maxims of equity — "he who comes into equity must come with clean hands." *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947). The purpose of the doctrine of unclean hands is to maintain the integrity of the courts of equity and shield them from misuse by litigants whose actions denigrate the very principles of equity the courts are meant to uphold. *See Nakahara v. NS* 1991 Am.Trust, 71 8A.2d 518, 522 (Del. Ch. 1998); *In re Enstar Corp.*, 593 A.2d 543, 552 (Del. Ch. 1991); *Skoglund v. Ormand Industries, Inc.*, 372 A.2d 204, 213 (Del. Ch. 1976).

[84] The plaintiffs have pointed to the six factors outlined in the Third Circuit's *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863 (3rd Cir. 1984), decision as aiding them. I do not believe these factors aid the plaintiffs at all. The record clearly shows that Lygren concocted a false explanation in a bad faith attempt to persuade this court to lift the Stay Order under a false impression as to the material facts. That sort of purposeful sharp practice warrants a harsh remedy under the *Poulis* factors, especially in light of the overall torpor with which the plaintiffs have proceeded and the lack, in my view, of an appropriate alternative remedy, given the passage of time and the seriousness of the misconduct at issue.

B. STANDING

The defendants claim that evidence that arose during discovery and other developments have revealed that Plenteous and Parfi now lack standing to serve as derivative plaintiffs.[86]

Section 327 of the Delaware General Corporation Law and Court of Chancery Rule 23.1 specify the minimal requirements that must be met by derivative plaintiffs.[87] Taken together, they require that a "plain-

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[85] The plaintiffs have not argued that Parfi should be distinguished from Plenteous on this score. Given that and given that Parfi's litigation leader Lindbo has shaped the litigation strategy in this case with Lygren and did nothing to clarify the misimpressions Lygren gave, I see no basis to distinguish between them. In this respect, it is also notable that Parfi's percentage interest in this case — as a Consortium member — is now only 1%, with Plenteous holding an interest of over 90%.

[86] *See* Defs.' Supp. Br. at 46-47; Defs.' Rep. Br. at 19-22.

[87] Section 327 provides that:

In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation *at the time of the transaction of which such stockholder complains* or that such stockholder's stock *thereafter devolved upon such stockholder by operation of law.*

8 Del. C. § 327 (emphasis added). Rule 23.1 provides:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or

tiff, bringing a derivative suit on behalf of a corporation, must be a stockholder of the corporation at the time he commences the suit and must maintain that status throughout the course of the litigation."[88] Thus, to have standing a derivative plaintiff must satisfy two tests: 1) the contemporaneous ownership test, which requires stockholders to have owned stock at the time of the wrong complained of,[89] and 2) the continuous ownership rule requiring stockholders to maintain their shareholder status throughout the litigation.[90] The defendants argue that Plenteous and Parfi both fail to satisfy the continuous ownership test and that Parfi also fails to satisfy the contemporaneous ownership requirement as to some of the Challenged Transactions.

1. Plenteous

Plenteous fails the continuous ownership requirement because it is not currently a shareholder of Mirror Image.

> that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law.

Ct. Ch. R. 23.1.

[88] *Heit v. Tenneco, Inc.*, 319 F. Supp. 884, 886 (D. Del. 1970) (citing *Hutchison v. Bernhard,* 220 A.2d 782 (Del. Ch. 1965)); see also *Feldman v. Cutaia,* 2007 WL 5211892, at *6 (Del. Ch. Aug. 1, 2007), aff'd, 2008 WL 2223084 (Del. May 30, 2008) (citing *Lewis v. Anderson,* 477 A.2d 1040, 1046 (Del. 1984)).

[89] "[A] stockholder plaintiff must either have been a stockholder at the time of the transaction of which she complains or her stock must have devolved upon her thereafter by operation of law." *Schoon v. Smith,* ___ A.2d ___, 2008 WL 375826, at *4 (Del. Feb. 12, 2008) (emphasis omitted).

[90] *Lewis v. Anderson,* 477 A.2d at 1049. *See also* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS §13.11 (2008) ("Thus, a plaintiff who is not a stockholder, or who ceases to be a stockholder during the pendency of his suit, loses standing to maintain a derivative action.").

Plenteous has not owned stock in Mirror Image since November 2002. In November of that year Mirror Image effected a 1-for-100,000 share reverse stock split. This left Plenteous with 0.94425 shares of Mirror Image stock. Because Mirror Image's certificate of incorporation had been previously amended to eliminate fractional shares, all fractional shareholders after the split were paid the fair value of their post-split shares. Accordingly, Plenteous was sent a check for $944.25 and no longer owns any shares in Mirror Image.

Faced with the defendants' argument that Plenteous is not a Mirror Image stockholder, the plaintiffs now belatedly assert that the entire transaction was a fraud designed to deprive stockholders of their right to sue derivatively.[91] But Plenteous never brought suit to enjoin or rescind the reverse stock split. Nor have the plaintiffs ever brought a new suit or sought to amend their complaint to allege breaches of fiduciary duty with regard to the reverse stock split.[92] Mirror Image contends that it had legitimate tax and financial reasons for carrying out the transaction that had nothing to do with eliminating Plenteous as a stockholder in order to deprive it of derivative standing. This court need not examine the substance of the reverse split to decide this motion. The time for the plaintiffs to bring a challenge to the reverse split has long come and gone; indeed, it is nearly a full three years after the original three years limitation to challenge the reverse split expired.[93] As a result, the plaintiffs are in no position to invoke the exception to the continuous ownership rule in *Lewis v. Anderson*, which applies when the transaction that deprives the plaintiffs of ownership is itself the subject of a claim of fraud.[94] This is a narrow exception that should be cautiously applied even when the affected plaintiffs act with diligence.

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[91] That desire would have been rather incompletely achieved by the reverse split, because Parfi was not eliminated as a stockholder in the reverse split.

[92] THE COURT: ... there's never been any claim made about the reverse split; right?
[PLAINTIFFS' COUNSEL]: There has not been a claim in the complaint for the reverse split, no, there has not.
THE COURT: Well, where else would the claim be found? ... Where else would a claim attacking the reverse stock split as a fraud simply done to deprive your client of derivative standing, where would that allegation be?
[PLAINTIFFS' COUNSEL]: It is — it is not pled, Your Honor.
THE COURT: And so it doesn't exist in any form.
[PLAINTIFFS' COUNSEL]: No, Your Honor.

06/04/08 Tr. at 90-91.

Here, the plaintiffs admit that they never took any steps to challenge the reverse split, and their argument that their pending claims implicitly acted as a challenge to that independent transaction lacks substance. If a derivative plaintiff is subject to a transaction that will deprive it of its shares, it must move with alacrity to challenge that independent transacttion, or it will lose standing.[95] It cannot assume that its pending claims are an "implicit" challenge to that independent transaction. Corporations must continue to operate during the pendency of a derivative suit, and a plaintiff who wishes to maintain its standing must act to protect its interests. Plenteous did not do that, and it cannot now base its standing on a time-barred claim that the reverse split was effected as a fraud.[96] It would be inequitable and prejudicial to the defendants to have to litigate at this late date the propriety of a nearly six year old transaction.

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[93] The limitations period for a breach of fiduciary duty claim is three years. E.g., *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *7 n.44 (Del. Ch. Oct. 19, 2006).

[94] *Lewis v. Anderson* held that the standing requirements do not apply "(1) where the merger itself is the subject of a claim of fraud; and (2) where the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise." 477 A.2d at 1046 n.10 (citations omitted). But, the *Lewis v. Anderson* exceptions are narrow ones to the general and "well established [rule] that a merger which eliminates a derivative plaintiff's ownership of shares of the corporation for whose benefit she has sued terminates her standing to pursue those derivative claims [because the] derivative claims pass by operation of law to the surviving corporation, whose board of directors then has the sole right and standing to prosecute the action." *Lewis v. Ward*, 852 A.2d 896, 900-01, 904 (Del. 2004); see also DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE – FIDUCIARY DUTIES OF CORPORATE DIRECTORS 1391 (1998) (noting that these exceptions have been narrowly construed).

2. Parfi

The defendants challenge Parfi's standing for two independent reasons: 1) that Parfi fails the contemporaneous ownership rule as to the April and July Subscriptions; and 2) that Parfi fails the continuous ownership rule because it divested itself of any economic interest in Mirror Image during the course of this litigation. I address those arguments in turn.

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[95] See *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del. 1970) (holding that a plaintiff cannot continue a derivative action after a merger when the plaintiff did not make a direct attack on the merger and stating that: "If a proposed merger is sought to be used for the coverup of wrongful acts of management, a Court of Equity...will protect the innocent stockholder victim. ...This plaintiff, however, took no direct action to restrain or to attack the merger").

[96] The reverse split clearly was not a "reorganization which [did] not affect plaintiff [Plenteous's] ownership of the business enterprise." *Lewis v. Anderson*, 477 A.2d at 1046 n.10.

a. Contemporaneous Ownership

Ordinarily, in order to meet the contemporaneous ownership requirement of Section 327, a plaintiff must have owned stock at the time each of the transactions of which it complains occurred. By its own admission, Parfi did not own Mirror Image stock as of the April and July subscriptions. Therefore, Parfi attempts to invoke a narrow exception to the contemporaneous ownership rule that applies when a plaintiff obtains its shares by operation of law. But that narrow exception is inapplicable here, because "[a] transfer of shares by operation of law means that the shareholder acquires the shares *without any act or cooperation on his or her part.*"[97] Parfi engineered its acquisition of its Mirror Image shares through contracts and so does not qualify.

In their complaint, the plaintiffs referred to Parfi as "the successor-in-interest to [Mirror AB]," and the previous opinions in this case cite it as such.[98] But as discovery revealed, Parfi is not in fact the successor-in-interest to Mirror AB, and Parfi's stock did not devolve upon it "by operation of law" as the term is understood under Delaware law. Instead, Parfi simply purchased Mirror AB's Mirror Image shares. In May 1999, after Mirror AB, Mirror Image's original parent company, changed its name to Drax International AB, it entered into a contract essentially selling its business and assets to Parfi on October 14, 1999.[99] But, that contract did not cover the shares in Mirror Image, although Parfi somehow purchased whatever claims Drax had relating to Mirror Image, and signed the Joint Prosecution Agreement with Plenteous, Gillberg, and other parties on Oct. 28, 1999.[100] But it was not until a few days later, on Nov. 3, 1999, that Parfi actually acquired Mirror AB's shares of Mirror Image in a separate agreement with Drax for nominal consideration (one Swedish kroner, the equivalent of less than twenty cents).

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[97] WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5981 (2004) (emphasis added). For example, "the concept has frequently been applied to situations where a plaintiff acquired interests in shares as a result of rights obtained through a will." *Id.*

[98] *See, e.g.*, Parfi IV, 926 A.2d at 1073 n.1.

[99] *See* Macdonald Aff. Ex. 5.

Equally relevant is the fact that Parfi is not in fact the corporate successor of Mirror AB. It is a separate corporation that purchased certain assets of Drax. Also relevant is the fact that the stockholders of Parfi were not identical to the stockholders of Mirror AB. Many of Parfi's stockholders were former Mirror AB stockholders, but they did not own Parfi in the same percentage as they owned Mirror AB. Moreover, Parfi appears to have raised new capital by touting the value of the litigation rights it had supposedly acquired. That is, it sought out new investors by pitching the value of a derivative claim, as well as the value of the claims in the Swedish Arbitration.

Given these facts, it is obvious that Parfi did not acquire its shares by operation of law in the sense relevant to the application of the contemporaneous ownership rule. Rather, it explicitly went out and bought shares after the wrongs it challenged. Therefore, Parfi is barred from challenging the April and July Subscriptions because it was not a stockholder of Mirror Image until after the Subscriptions were completed.

b. Continuous Ownership Rule

Discovery has revealed that during the course of this litigation, Parfi emptied itself of any economic interest in Mirror. The defendants contend that by doing so, Parfi has rendered itself an inadequate derivative plaintiff. In my view, that argument is correct but awkwardly framed. For reasons I detail, Parfi, in my view, violated the substantive policy behind the continuous ownership rule and lost derivative standing. The facts relevant to this argument are clear, if unusual. The unusual part results from the plaintiffs' own actions, which involved their entry into contractual arrangements that purported to allocate economic interests in the outcome of claims belonging to Mirror Image in this derivative suit.

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[100] *See* Macdonald Aff. Ex. 6.

From the signing of the JPA, the various plaintiffs appear to have opened up a litigation bazaar and freely traded interests in this litigation and the Swedish Arbitration. The participants in this litigation rights market refer to themselves as the Consortium. It is undisputed that Parfi soon ran into problems meeting its obligations under the JPA. Either because it feared action by its creditors, or for tax reasons, or for a combination of the two reasons, Parfi at one point transferred all of its claims and rights to recovery to a subsidiary, Wyeshaw Ltd., while retaining record ownership of its Mirror Image shares. By late 2002 or early 2003, Parfi defaulted in its obligations under the JPA and forfeited any rights of recovery in this action or the Swedish Arbitration.[101] In fact, to avoid insolvency, Gillberg, Lindbo, and Lygren arranged for Parfi to sell half of its Mirror Image shares to other members of the Consortium.[102] No doubt in recognition that it would be difficult to remain as a plaintiff when it had no right of recovery and knowing that if faced upcoming conferences with the court, Parfi engaged in a January 2005 transaction whereby it bought back the shares it had sold to the Consortium for around $145,000 and received in exchange a 1% interest in the Delaware litigation for itself and another 0.4% on behalf of a company controlled by Lindbo.[103] Consistent with its activities as a litigation rights market maker, Parfi had earlier offered its shareholders a chance to invest directly in the Consortium, and apparently got 300 of its stockholders to exchange cash for a 5% interest in any recovery in this case.

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[101] Under the JPA, specifically section 9 thereof, in the event that a party to the JPA fails to timely fulfill its obligations under the JPA, that party's allocation percentage of recovery will be amended to zero. Thereafter, that party has no further rights or entitlement to participate in any judgment or settlement obtained by the parties to the JPA. *See* Macdonald Aff. Ex. 6.

[102] *See* Paris Aff. Ex. 99.

Parfi argues that none of these facts affect its standing because at all times it held on to nominal ownership of some Mirror Image shares. As a result, it contends that it literally was a continual owner of Mirror Image, and thus there was no literal violation of Section 327 and Rule 23.1.

But this is a court of equity, and the mere satisfaction of the literal terms of Section 327 and Rule 23.1, does not mean that this court cannot fashion common law rules of standing to address novel problems. In this respect, it must be remembered that derivative suits raise important policy considerations because they permit stockholders to take action in place of the corporation's board of directors. For that reasons, our law has embraced certain doctrines designed to better ensure that the derivative suit mechanism is used responsibly and for purposes consistent with the best interests of the corporations whose interests are ultimately at stake.[104]

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[103] *See* Paris Aff. Ex. 100.

[104] See, e.g., *Bakerman v. Sidney Frank Imp. Co.*, 2006 WL 3927242, at *11 (Del. Ch. Oct. 16, 2006) (outlining considerations

The obvious purpose of the continuous ownership rule is to ensure that the plaintiff prosecuting a derivative action has an economic interest aligned with that of the corporation and an incentive to maximize the corporation's value. Admittedly, the lack of any substantiality of ownership requirement limits the extent to which the continuous ownership rule checks the potential for abuse inherent in the derivative suit context, but nonetheless it does set an important, policy-based minimum.

Section 327 and Rule 23.1 were written at a time when the securities markets did not so readily facilitate the decoupling of share ownership from an underlying economic interest. Indeed, prior Delaware case law understands the purpose of the continuous ownership rule precisely to be the requirement that the plaintiff maintain a continuous economic interest in the litigation, in the sense that its continued ownership of shares ensures that the plaintiff would benefit if the derivative suit resulted in redress to the corporation.[105] A good example of this understanding is set forth in the Supreme Court's decision in *Alabama By-Products Corp. v. Cede & Co.*, which states:

[A] shareholder is permitted to intrude upon the authority of the board by means of a derivative suit only because his status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation. Once the derivative plaintiff

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relevant to whether a plaintiff is adequate to maintain a derivative suit).

[105] For this reason, Delaware courts have never focused on record ownership in determining whether a derivative plaintiff had standing. Rather, the court has looked to beneficial ownership as the test. *See, e.g.*, *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 111-2 (1948) (allowing an equitable owner to pursue a derivative action).

ceases to be a stockholder in the corporation on whose behalf the suit was brought, *he no longer has a financial interest in any recovery pursued for the benefit of the corporation*. . . . [B]ecause a plaintiff may lose his incentive to prosecute a suit by being divested of the property interest (shares of stock) in the corporation for whose behalf he acts, the derivative suit requires "continued as well as original standing.[106]

Because of the important policy purpose served by the continuous ownership rule, the rule is a bedrock tenet of Delaware law and is adhered to closely.[107] Where, as here, a derivative plaintiff has become an "empty plaintiff,"[108] form (i.e., ownership of shares) does not trump substance (i.e., lack of any economic interest whatsoever in the recovery pursued for the corporation),[109] and the clear policy purpose served by the traditional application of the continuous ownership rule is implicated.[110] Whatever right exists to bring a derivative action derives its origin from our common, not statutory, corporate law,[111] and given that reality, I have no hesitance in holding that a derivative plaintiff who empties itself of any interest in the underlying litigation loses standing. Although it is too often overlooked, derivative suits are a form of representative action. Indeed, they should be seen for what they are, a form of class action. Representative actions raise legitimate concerns about the extent of alignment bet-

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[106] *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 265-66 (Del. 1995) (emphasis added) (citing Anderson, 477 A.2d at 1047); see also *Schilling v. Belcher,* 582 F.2d 995, 1002 (5th Cir. 1978) ("Standing is justified only by this proprietary interest created by the stockholder relationship *and the possible indirect benefits the nominal plaintiff may acquire qua stockholder of the corporation which is the real party in interest*.") (emphasis added) (quoting *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-36 (3d Cir. 1970), cert denied, 401 U.S. 974 (1971)); *Portnoy v. Kawecki Berylco Indus., Inc.*, 607 F.2d 765, 767 (7th Cir. 1979) ("[B]ecause a shareholder will receive at least an indirect benefit ... from any corporate recovery, he has an adequate interest in vigorously litigating the claim. A non shareholder or one who loses his shareholder interest during the course of litigation may lose any incentive to pursue the litigation adequately.").

[107] *See, e.g.*, *In re New Valley Corp. Deriv. Litig.*, 2004 WL 1700530, at *3 (Del. Ch. June 28, 2004); *Ash v. McCall*, 2000 WL 1370341, at *12 (Del. Ch. Sept. 15, 2000) (referring to "*Lewis v. Anderson's* apparently iron-clad rule").

[108] I borrow this phrase from an important article, Henry T. C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. L. 1011, 1014 (2006), which, along with another important article, Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775, drew attention to the problem of "empty voting" of corporate shares; that is, the voting of corporate shares by persons who

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lacked any economic interest in the corporation or, even worse, stood to gain if the corporation lost. See also Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership,* S. CAL. L. REV. 811 (2006); Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions,* 156 U. PA. L. REV. 625 (2008).

[109] *Gatz v. Ponsoldt,* 925 A.2d 1265, 1280 (Del. 2007) ("It is the very nature of equity to look beyond form to the substance of an arrangement. 'Equity will not permit one to evade the law by dressing what is prohibited in substance in the form of that which is permissible.'") (quoting *Kelley v. Mayor and Council of City of Dover,* 300 A.2d 31, 38 (Del. Ch. 1972)) (footnote omitted). To be sure, there is case law suggesting no economic interest is required to have standing in Section 220 DGCL proceedings. *Macklowe v. Planet Hollywood, Inc.*, 1994 WL 560804, at *3 (Del. Ch. Sept. 29, 1994); see also, *Martin, supra* note 108 at 778-779, 788.

[110] *See Braasch v. Goldschmidt,* 199 A.2d 760, 765-6 (Del. Ch. 1964) (ruling that plaintiffs who are no long stockholders cannot maintain a derivative action).

[111] *Schoon v. Smith,* ___ A.2d ___, 2008 WL 375826, at *3 (Del. Feb. 12, 2008) (referring to derivative actions as 'a creature of equity') (quoting WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5980 (2004)).

ween the interests of the named plaintiffs and of those who the named plaintiffs purport to represent.[112] One can confidently say that adhering to a minimum requirement that the named plaintiffs in a derivative action retain an actual economic interest in the litigation will not be an obstacle to useful derivative suits. Rather, it is at most, a non-stringent requirement necessary to ensure the most minimal alignment between the interests of the plaintiff and the corporation whose interests he supposedly seeks to vindicate.[113]

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[112] *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 375 (2000) ("The initial problem is that there are many decisions in life over which most individuals would not wish to cede authority to an unchosen agent to act on their behalf — at least not simply because that person bore surface similarities with them and had no discernible conflict of interest. The deeper problem lies, however, in the fact that even an entirely unconflicted representative whose characteristics correspond in every way with their own might still be an ineffective agent."); John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222 (1995).

[113] I recognize that in the context of § 220, this court has refused to look behind record ownership to determine whether a stockholder had a net long interest in the corporation. *See Deephaven Risk Arb Trading Ltd. v. United Global Com, Inc.*, 2005 WL 1713067, at *5-6 (Del. Ch. July 13, 2005). Section 220 cases present a different context in part because § 220 creates a statutory right to books and records that is not qualified by a requirement that the owner actually have an economic interest in the firm's success. Derivative actions are a creature of common law, not statute. E.g., *Schoon*, ___ A.2d ___, 2008 WL 375826, at *3. Most important, unless one perceives the continuous ownership rule to lack any substantive context, it would make no policy sense for this court to ignore the reality of an empty plaintiff, whose trading activity has emptied himself of any interest in the outcome of the lawsuit. As a matter of our common law, it is more sensible to uphold the long-understood policy purpose behind the continuous ownership rule.

Once Parfi divested itself of its economic interest in this litigation, it lost standing to press this derivative case permanently.[114] By definition, it cannot rectify an interregnum when a continuity of interest is required.[115] Interestingly, the interest that Parfi bought back appears to bear no relation to its proportionate ownership interest in Mirror Image, and only to be based on some percentage ownership in the litigation rights market comprised by the Consortium.

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[114] *See New Valley,* 2004 WL 1700530, at *3-4:

Essentially, [Goodwin] argues that his *subsequent purchase* of stock bookends a short time span of not holding stock punctuating continuous ownership by a long-term investor. ***To allow the subsequent purchase to complete the story, however, would essentially allow Goodwin to 'buy back' into the litigation. Such an action, even though by a formerly long-term stockholder as opposed to a new investor, is exactly the type of action the continuous ownership requirement is designed to prevent.*** Just as Goodwin could not have bought his way into a derivative suit at its outset, so too can he not buy his way back into such a suit after losing his standing. Goodwin has stated that he 'did not realize that [his] sale of New Valley stock while still retaining New Valley warrants might affect [his] standing as a plaintiff in this case.' The continuous ownership requirement, however, has been held applicable even in situations where individuals' stock ownership has been *involuntarily* terminated in, for example, cash-out mergers. Here, Goodwin *voluntarily* sold his shares. Again, ... once he did so, he lost standing to pursue this derivative litigation as lead plaintiff. (footnotes omitted, second emphasis added).

[115] Moreover, repurchases implicate the purpose long understood to be served by the contemporaneous ownership rule. ***Rosenthal v. Burry Biscuit Corporation,*** 60 A.2d at 111 (the contemporaneous ownership rule "was enacted in Delaware to prevent what has been considered an evil, namely, the purchasing of shares in order to maintain a derivative action designed to attack a transaction which occurred prior to the purchase of the stock."). Admittedly, some have rationally questioned the continuing utility of that rule, especially in circumstances when a subsequent purchaser had no knowledge of a wrong that arose before his purchase and seeks redress for the corporation when becoming aware of that wrong. *See* J. Travis Laster, *Goodbye to the Contemporaneous Ownership Requirement,* DEL. LAW., Spring 2008, at 25. But the rule remains in place.

c. Inadequacy As Derivative Plaintiffs

Lastly, the defendants claim that Plenteous and Parfi do not qualify as adequate derivative plaintiffs as mandated by Chancery Rule 23.1, based on several grounds that are contested by Plenteous and Parfi.

Pursuing a derivative claim requires more than ownership. A plaintiff must also "satisfy the adequacy requirements implicit in Court of Chancery Rule 23.1."[116] A "derivative plaintiff serves in a fiduciary capacity as representative of persons whose interests are in plaintiff's hands and the redress of whose injuries is dependent upon her diligence, wisdom, and *integrity.*"[117]

Having already determined that the plaintiffs misled this court about material events for tactical advantage, I cannot conclude that they are adequate to serve in the fiduciary capacity of a derivative plaintiff. Moreover, in a prior decision, this court pointed to prior instances when the plaintiffs had been less than straightforward with this court.[118] Furthermore, the plaintiffs have spent a material amount of this litigation in stasis because they were not paying their initial counsel or feuding with and refusing to assent to the withdrawal of the second set of lawyers. And the one remaining named plaintiff who actually owns shares has a trifling economic interest in the outcome of the case. Given this overall record, and especially the conduct addressed earlier in this decision, the plaintiffs are not, in my view, appropriate derivative plaintiffs.

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[116] *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *10 (Del. Ch. Oct. 16, 2006).

[117] *In re Fuqua Indus., Inc. S'holders Litig.*, 752 A.2d 126, 129 (Del. Ch. 1999) (citing *Katz v. Plant Indus., Inc.*, 1981 WL 15148 (Del. Ch. Oct. 27, 1981)) (emphasis added).

[118] *Parfi III*, 842 A.2d at 1258.

Lastly in this regard, it has emerged that the authority of counsel for the plaintiffs to proceed on Parfi's behalf is uncertain. Parfi is now bankrupt, and its only assets consist of its three shares of Mirror Image and 1% interest in this litigation. At oral argument, it was suggested that the trustee in bankruptcy had tried to sell Parfi's shares to the defendants. Even more important, it was not clear that the board of Parfi had actually authorized counsel to proceed on Parfi's behalf. If this case were to proceed with Parfi as a plaintiff, proof that Parfi's duly authorized governing body desired to move forward would have to be provided.

V. APPLICATION FOR ATTORNEYS' FEES

In September 2005, I granted the defendants' motion to compel and awarded reasonable fees to the defendants from preparing "the Motion, supporting memorandum of law and reply in further support of the Motion," to be paid by Plenteous, Parfi and Gillberg.[119] But, I expressly limited the award to this discrete aspect of the litigation and did not find that an award of the defendants' total litigation expenses to be warranted.[120]

The defendants seek a net amount of $50,957.50, having been paid about 27% of the total amount of their fees, some $18,753.50, by former plaintiff Gillberg in connection with his voluntary dismissal. The defendants calculated their total fees to be $69,711.00 by aggregating all of the attorneys' fees and expenses incurred in relation to the motion to compel; in total, this involved five attorneys,[121] and 165.3 hours to prepare fewer than 30 pages of briefing. The defendants assert that this is reasonable "given the somewhat unusual posture of the case at that time, and the generally intransigent position taken by the remaining plaintiffs with respect to discovery at that time," due to which the motion to compel "required substantial research and consideration."[122] The defendants have submitted copies of the relevant portions of the bills submitted to Xcelera in connection with the motion to compel. In their calculation, time entries relating to other activities on the matter have been excluded from the time spent on the motion to compel, based on estimates using the attorneys' time entries and recollections.[123]

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[119] *See* Order of October 30, 2005.

[120] *See* 09/12/05 Tr. at 79-80 ("It's just preparing the motion. Doesn't mean the entire litigation. So before anybody has a panic attack and — and I don't want the — the defendants to lard this up. They're relatively focused papers.").

The plaintiffs contest the fee amount sought by the defendants and ask that "the Court reduce Defendants' attorneys' fees to an amount not in access of $15,000 or an amount the Court determines is reasonable in light of tasks at issue and work performed."[124] The plaintiffs did not do much to support their argument other than to note that their own lawyers expended far less time in addressing the motion to compel than did the defendants and that the issues on the motion to compel were not, in the plaintiffs' view, complex.

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[121] The defendants were represented by four attorneys (two partners, of whom one replaced the other at oral argument, one counsel and one associate) from Wilmer Cutler Pickering Hale & Dorr LLP and one lawyer (a director) from Richards, Layton & Finger P.A.

[122] *See* Macdonald Aff. at 4.

[123] *Id.* at 4-5.

[124] Pls.' Opp'n. Br. at 54.

In determining what fees to award in connection with a discovery sanction, this court has the discretion to examine the circumstances and determine what fees are reasonable.[125] After considering the relevant factors,[126] I conclude that the defendants are entitled to less than all of the fees and expenses they seek. I do not base that reduction on any problem with defense counsel's rates, or the hours spent by Delaware counsel reviewing and commenting on the motion to compel briefs for the defendants. Rather, I conclude that a material reduction is required because an excessive number of hours were spent by the defendants' New York counsel in crafting the briefs in support of the motion to compel brief. Although the motion to compel involved important issues in this case, which counsel addressed in a professional and effective manner, the 165 hours expended were disproportionate to what it should have taken to write the two briefs in question.[127] Much of the excess expense here appears to have resulted from a sad personal situation faced by a senior lawyer on the case, who had to step aside for a time, but that extra expense should not be borne by the plaintiffs. What apparently happened was that a senior attorney unfamiliar with the file spent a lot of time getting up to speed on the case generally, resulting in an excess number of hours to produce the specific work product at issue.

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[125] *Johnston v. Arbitrium (Cayman Islands) Handels,* 720A.2d542, 547.

[126] In a recent decision, the Supreme Court has suggested that this court should consult Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct in addressing the reasonableness of a request for attorneys fees, even when the matter is not a dispute between a client and counsel. *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 243 (Del. 2007). The Rule 1.5(a) factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. In this case, the relevant factor is really the first. There is no basis to challenge the professional competence of defense counsel or the reasonableness of their rates, and their efforts were successful. The sole issue is whether the amount of time expended was disproportionate to the tasks involved.

Unlike the plaintiffs, however, I do not think the defendants deserve to be left looking like a 21st century Johnny Unitas. Rather, a more modest trim is in order, especially given the reality that it was the plaintiffs' unjustified refusal to produce relevant discovery that necessitated the motion to compel in the first place. Therefore, I reduce the requested fees to approximately 75% of the total sought. Giving the remaining plaintiffs credit for the $18,753.50 paid by Gillberg, I find them responsible for paying $33,529.75 to the defendants.

VI. CONCLUSION

For the foregoing reasons: 1) the defendants' motion under Rule 41(b), and in reliance on the inherent authority of the court to address misconduct in the litigation process, to dismiss the plaintiffs' claims with prejudice is GRANTED; 2) in the alternative, the defendants' motion to dismiss the derivative counts of the complaint because Plenteous and Parfi lack standing and are inadequate derivative plaintiffs is GRANTED; and 3) Plenteous and Parfi shall pay to the defendants the sum of $33,529.75 in fees and expenses within 30 days of the date of this opinion. Finally, in view of the rulings on the defendants' motion, there is no basis to disturb the Stay Order and the plaintiffs' motion to lift the Stay Order is DENIED. The defendants shall submit a conforming order, upon notice as to form, within five days.

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[127] *Richmont Capital Partners I, L.P. v. J.R. Investments Corp.*, 2004 WL 1152295, at *3 (Del. Ch. May 20, 2004) (when determining what fee is reasonable to award, courts "generally exclude excessive, redundant, duplicative or otherwise unnecessary hours.").

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB,
GUNNAR GILLBERG,
PLENTEOUS CORP., and
GRANDSEN, LTD.,

Plaintiff Below-Appellants,

v.

MIRROR IMAGE INTERNET
INC., XCELERA.COM INC.,
ALEXANDER M. VIK,
GUSTAV VIK and HANS
MAGNUS FAJERSON

Defendants Below-Appellees.

No.____________

Court Below:
Court of the
Chancery in and for
New Castle County
C.A. No. 18507-NC

NOTICE OF APPEAL

TO: Jesse A. Finkelstein (No. 1090)
Brock E. Czeschin (No. 3928)
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Court Reporters Office
New Castle County Courthouse

500 North King Street, Suite 11400
Wilmington, DE 19801 - 3759

PLEASE TAKE NOTICE that Parfi Holding AB and Plenteous Corp., Plaintiffs Below-Appellants do hereby appeal to the Supreme Court of the State of Delaware the Order of Dismissal dated September 11, 2008. A copy of the Order of Dismissal dated September 11, 2008 which is sought to be reviewed is attached hereto as Exhibit A.

The names and addresses of the attorneys below for the Appellees are:

Jesse A. Finkelstein (No. 1090)
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New York, NY 10022

The parties against whom the appeal is taken are Mirror Image Internet, Inc., Xcelera.Com, Inc., Alexander M. Vik, Gustav Vik, and Hans Magnus Fajerson.

There are no parties against whom the appeal is not taken.

PLEASE TAKE FURTHER NOTICE that the Appellants hereby designate the transcripts of the proceedings in accordance with Supreme Court Rules 7(c)(6) and 9(e)(ii) in the following manner: Appellants have attached as Exhibit B a statement pursuant to Supreme Court Rule 9(e)(ii) directing the Court Reporter who recorded the oral argument held June 4, 2008 in connection with the issues addressed in the Opinion dated September 4, 2008 (Neith D. Ecker), to prepare the transcript of the aforementioned proceedings and oral arguments and to file it in the Court below once prepared.

ATLE LYGREN for
PARFI HOLDING AB and
PLENTEOUS CORP.

/s/ Atle Lygren

Atle Lygren

Primary Address:
Chalet BALYBU
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The Woodlands
TX 77380
USA

DATED: October 14, 2008.

EXHIBIT A
OF NOTICE OF APPEAL TO THE DELAWARE SUPREME COURT DATED OCTOBER 14, 2008

[Order of the Delaware Chancery Court Dated Sep. 11, 2008 **Omitted here** for the purposes of this Appendix, but is set out at pages 47-48 herein]

&

EXHIBIT B
OF NOTICE OF APPEAL TO THE DELAWARE SUPREME COURT DATED OCTOBER 14, 2008

[Directions To Court Reporter of Proceedings--Below to be transcribed Pursuant to Delaware Supreme Court Rule 9(e) **Omitted** for the purposes of this Appendix]

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB, and PLENTEOUS CORP. Plaintiff Below-Appellants, *v.* MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON Defendants Below-Appellees	No. 518, 2008 Court Below: Court of the Chancery in and for New Castle County C.A. No. 18507-VCS

MOTION FOR REHEARING EN BANC

1. The following appendices are enclosed with this motion for rehearing ("Application"), to which this Court is respectfully referred:

Appendix (AA): Certificate of Good Faith herewith, pursuant to the Supreme Court Rules;

Appendix (BB): Motion for Re-argument, filed on even date (with affidavit);

Appendix (CC): Order of this Court dated 01.12.09 ("Order"), giving rise to this motion;

Appendix (DD): Motion of Substitution ("Motion"), filed 11.02.08 (with affidavit);

Appendix (EE): Opposition to Motion ("Opposition"), filed 11.17.08 (with appendices);

Appendix (FF): Reply to Opposition ("Reply"), filed 01.12.08.

2. The Appendices record the submissions made to date, including the Motion for Re-Argument of even date. The background to this Application is more extensively covered in the Motion (Appendix DD) and its supporting affidavit, where the documentation adduced confirms Lygren is the assign.[1] The Motion also confirms the steps taken at the time by Lygren to secure counsel. The Opposition to the Motion is set out as Appendix EE, whereby the Appellees have singularly failed to consider the fundamental distinctions arising by virtue of the assignment here.[2] The Reply thereto is set out at Appendix FF, which traverses the counter-argument in somewhat technical terms. The order of this Court giving rise to this Application is set out as Appendix CC ("Order"). The Motion for Re-Argument, filed contemporaneously herewith (of even date) is set out as Appendix BB together with sup-porting affidavit ("Affidavit"). Here, the arguments are visited albeit in technical terms, in light of the Order.

3. For the sake of brevity here, this Court is respectfully referred to the enclosed documentation, and moreover the Order and the resulting Motion for Re-Argument with Affidavit. Three grounds for refusing the Motion are set forth in the Order, which are dealt with in-turn below.

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[1] See the affidavit supporting the Motion, set out in Appendix (DD). Those plaintiff-rights enjoyed by Plaintiff-below Parfi Holding AB and Plenteous Corp. now vest in Lygren by virtue of the Assignment set out therein. Shareholdings (and rights thereto) formerly enjoyed by Plenteous in the Appellee Mirror Image Internet, Inc., now vest in Lygren by virtue of the grant by way of deed, also set out therein.

[2] It is asserted that strictly speaking, appellate rights are property rights *ejusdem generis* (and part of plaintiff-rights), thus capable of assignment.

ASPECT I: THE RULE IN BRYAN v. DOAR. [3]

4. Several aspects allow the Application to be strongly distinguished from *Bryan v. Doar*. First, unlike *Bryan v. Doar*, here there is an assignment of rights which has been fully evidenced per the affidavit supporting the Motion (see Appendix DD).[4] The argument in this aspect is hardly controversial and is merely founded on property rights.[5] Hence, to interfere with those property rights would be unconstitutional.[6] Moreover, elsewhere an assignment of rights can act to allow plaintiff-substitution at the appellate stage.[7]

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[3] See Appendix (CC). *Bryan v. Doar* 918 A.2d 1086, 1089 (Del. 2006).

[4] See Appendices (DD), (FF) and (BB). There is no doubting that a corporation can validly assign a claim, even if made to circumvent the prohibition against a corporation appearing for itself. *Traktman v. City of New York*, 182 AD2d 814 (1991); and *Medical Facilities v. Pryke*, 172 AD2d 338 (1990). This reflects the general notion that underlying plaintiff-rights are alienable species of property therefore capable of transfer.

[5] See Appendices (FF) and (BB). Upon close inspection, an appellate right first vests when seised in the Court-Below, as plaintiff-rights *ejusdem generis*, and thus *sine qua non* also cannot vest irrevocably exclusively-so. Moreover, the appeal right vests by virtue of the Court-below's Opinion. To hold this appellate right *sui generis* as somehow *irrevocably* exclusive would interfere with the Plaintiffs-below's (and their assigns') unfettered right viz. free and full enjoyment.

[6] See Appendices (FF) and (BB): to deny the motion (plainly) would be "a wrong which directly results in the violation of a legal right": *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938).

[7] See Appendices (FF) and (BB): *CSFB 1998-C2 Park Mill Run, L.L.C. v. Garden Ridge Hilliard Delaware Business Trust*, 2006-Ohio-1535, Court of Appeals, 10th App. Dist.: "*During the pendency of this appeal, we have granted Park Mill Run's motion to substitute in its place as appellee CadleRock's Hilliard Property, L.L.C. ("CadleRock's"), pursuant to an assignment making CadleRock's the real property in interest in the matter.*" [at ¶1, emphasis added].

5. Second, unlike *Bryan v. Doar*, here Lygren cannot and does not abjure substitution.

6. Third, unlike *Bryan v. Doar,* this Application centers on the right to due process. In this respect, the due process aspects comprise those of the plaintiff-below Appellants and Lygren.[8] To wit, this Court is respectfully reminded of the deficiencies here viz. the procedural propriety per the Court-below, leading to the Opinion. These deficiencies are substantively documented in the Appeal Brief filed November 14, 2008.[9]

ASPECT II: TRANSPARENT ATTEMPT TO CIRCUMVENT THE NEED FOR COUNSEL.

7. For the reasons above, this Application can be distinguished from *Bryan and Doar*. Moreover, *Bryan v. Doar* cites *Microsystems v. Scandinavia Online AB* 226 F.3d 35 (2000). *Microsystems* clearly countenances the due-process aspects. In contrast here, the Order here fails to consider the due process aspects, and moreover that *Microsystems* clearly countenances exceptions to the general rule where due process is in doubt. This aspect is hardly controversial, given *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918).[10]

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[8] See Appendices (FF) and (BB): It is beyond doubt that a corporation may not be deprived of its property without due process: *Smyth v. Ames*, 169 U.S. 466 (1898). Also, see *Kentucky Co. v. Paramount Exch.*, 262 U.S. 544, 550 (1923); and *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

[9] App. Br. dated 11/13/08, with amended version dated 11/17/08. The failings here are multiple and manifest, undermining any notion the Court-below was an objective finder of facts or impartial (see also the Motion for Re-argument and the Affidavit thereto).

[10] See Appendix (BB). It is unconstitutional to enforce a judgment without first allowing an opportunity to be heard sometime before final judgment is entered. See also ***Baker v. Baker, Eccles &***

A well-established theme reflects those concerns of U.S. Supreme Court to safeguard the due-process clause of the U.S. constitution, whereby the right to rebuttal is pivotal (*Saunders v. Shaw*, 244 U.S. 317 (1917)).[11] As final confirmation, *Calloway v. Westinghouse Elec. Corp.*, 115 F.R.D. 73 (1987), also explicitly considers the due process aspects.[12]

8. As explored, reputation is an inalienable property right *in rem*.[13] As Lygren makes clear, in short order he has marshaled his resources in order to best remedy the damage caused to his good reputation.[14] Lygren believes he is best-placed to represent

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Co., 242 U.S. 294, 403 (1917); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236 (1900).

[11] See Appendix (BB). Where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.

[12] See Appendices (EE) and (FF). *Calloway* is cited in the Opposition. Note *Edmondson v. Nebraska* 383 F.2d 123 (1967) at ¶9 of the Opposition is inapposite. There, the purported-appellant Edmondson was dead (and had no reputation to injure). In any event, if fraud had been found, Edmondson's estate would have benefited by $450,000. Note: *Fitzgerald v. Vishay*: 918 A.2d 1170, 2007 (Del. Supr.) adds nothing here.

[13] See Appendices (FF) and (BB): HOLLAND *"Elements of Jurisprudence: 1st American Edition from the 7th English Edition"* (2006) *150, *160. Hence only Lygren himself or though his attorneys can redeem matters.

[14] See Appendices (FF) and (BB): There exists substantial precedent to confirm Lygren is of tested good plaintiff character. See *International Minerals and Resources S.A. v. Pappas*, 761 F. Supp. 1068 (S.D.N.Y. 1991); 96 F.3d 586 96 F.3d 586; 2nd Cir. (N.Y.) (1996); 5 Fed.Appx. 5, 2001 WL 196691, 2nd Cir. (N.Y.). Lygren as witness for plaintiffs. It can be safely inferred that at jury trial, Lygren's credibility was preferred.

his own interests for the purposes of Appeal.[15] Moreover, the credibility of Lygren was not even *sub judice* given that, during the *ultimate* case conference (August 2007), the option of a credibility mini-trial was offered, yet the Appellees failed to take-up that offer.[16] The App. Br. demonstrates that the Opinion was an ambush.[17] Hence, Lygren's attempts thus far are merely a transparent attempt to obtain due process only.[18]

ASPECT III: DEEMED CONSENT FOR DISMISSAL OF THE APPEAL.

9. This is explored extensively in Appendix BB hereto, and the Affidavit set out there. There is no explicit consent towards dismissal, nor can such consent be implied in the given circumstances here.

CONCLUSION.

10. The Opinion is an ambush, comprising egregious findings that Lygren (note: not any of the Plaintiffs-below) perpetrated a "fraud on the court".[19] Lygren demonstrates his wider understanding of the implications of the Opinion, especially viz. the doctrine of sound business judgment, which the Opinion seeks

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[15] See Appendix (BB): ¶20 of the Affidavit.

[16] See Tr. 08/15/07 p29, at A299 App. Br. Appendix.

[17] Rule 41(b) was not *sub judice*, as the Hearing June 4, 2008 was heard under Rule 41(e). For the same reason sanction under Rule 60 was not *sub judice*. These grave issues were not even discussed during the Hearing at any stage. The Hearing's transcript coversheet even states *"Argument on ... Rule 41(e) Motion"*.

[18] Supra, at footnote 4.

[19] Fraud on the Court is a finding so rare in the history of Delaware that previous counsel could find only one finding previously (which perhaps explains why the Appellees would rather have this Court trivialize it).

to undermine.[20] The underlying appeal has strong merit, and Lygren's reputation has been damaged by a judge who clearly understood the power of an internet-published opinion to ruin a business person's reputation.[21] In these most-peculiar of circumstances, to deny Lygren his Motion would be unconstitutional, especially given the assignments and the *ejusdem generis* property rights thereby comprised. For all the reasons set out here and before, this Application must be allowed.

ATLE LYGREN, PRO SE

/s/ Atle Lygren

Chalet BALYBU,
CH-1936 Verbier,
Switzerland.

DATED: January 27, 2009.

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[20] See Appendix (BB), and especially ¶17 of the Affidavit. See also 1 A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. d (1994) (business judgment rule protects directors "from the risks inherent in hindsight reviews of their unsuccessful decisions" and avoids "stifling innovation and venturesome business activity"). It is palpable that Strine VC does not consider this aspect of Delaware law, and neither is it found that Lygren had failed to act in a manner permitted in the conduct of Plenteous' legitimate business: handling its investments at a time when they were palpably under attack. See especially App. Br. at ¶C28 [p.32].

[21] See App. Br. at ¶D1 [p.34], and 8/15/07 Tr. p67 [A337, App. Br. App.].

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EXHIBIT AA
OF PETITIONER'S MOTION FOR REHEARING EN BANC JANUARY 27, 2009

[Petitioner's Certificate of Good Faith, pursuant to the Delaware Supreme Court Rules 4(f) and 18]

[INTENTIONALLY BLANK]

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB and PLENTEOUS CORP. Plaintiff Below-Appellants, *v.* MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON Defendants Below-Appellees	No. 518, 2008 Court Below: Court of the Chancery in and for New Castle County C.A. No. 18507-VCS

PRO SE CERTIFICATE OF GOOD FAITH PURSUANT TO SUPREME COURT RULES 4(f) AND 18

On the date below, I ATLE LYGREN, PRO SE, do hereby certify that the motion for re-argument and motion for rehearing, both of even date and filed herewith, are both made in good faith and not for delay.

/s/ Atle Lygren
Atle Lygren PRO SE

Primary Address:
Chalet BALYBU CH-1936 Verbier Switzerland.

US Address (Primary Address should be used):
1610 Woodstead Court, #458 The Woodlands, TX
77380, USA.

DATED: January 27, 2009.

[INTENTIONALLY BLANK]

EXHIBIT BB
OF PETITIONER'S MOTION FOR REHEARING EN BANC JANUARY 27, 2009

[Petitioner's Motion for Reargument to the
Delaware Supreme Court dated January 27, 2008
(*with* **Affidavit-in-Support**)]

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, and PLENTEOUS CORP., Plaintiff Below-Appellants, v. MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON Defendants Below-Appellees	No. 518, 2008 Court Below: Court of the Chancery in and for New Castle County C.A. No. 18507-VCS

MOTION FOR REARGUMENT

SYNOPSIS.

1. This case is exceptional. This Court is respectfully referred to the affidavit-in support, filed contemporaneously with this motion ("Affidavit"). As has been advanced before, this Court can find abundant safe grounds for distinction here, without disturbing settled case-law applicable elsewhere — including the case of *Bryan v. Doar.*[1] Further, nothing in the Delaware Constitution prevents the underlying motion of November 2, 2008 ("Motion").[2] Finally, the Motion is timely.[3]

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[1] *Bryan v. Doar* 918 A 2d 1086, 1089 (Del. 2006).

[2] From research, there is apparently no case on record whereby the same facts have prevented substitution or intervention. The Delaware Constitution is completely silent on the issues here (Del. Const. art IV, § 11).

[3] Cf. *United States of America v. LTV Corporation* 746 F.2d 51 (D.C. Cir. 1984) where the would-be appellant Wheeling failed to seek to intervene for the purposes of appeal at the right time.

DETAIL.

2. Lygren is the valid assign and jurisdiction to prosecute the underlying action vests in him exclusively. By virtue of the assignments, Lygren cannot abjure substitution – and does not – for reasons set out in the Motion and its supporting affidavit filed then. Whence this case is absent of the one factor which ultimately denied the purported-appellant his relief in *Bryan v. Doar*. As a further distinguishing feature, *Bryan v. Doar* did not comprise any assignment of underlying property rights. In contrast, the property rights here comprise the right to prosecute the action, which *ejusdem generis* include appellate rights. The assignments cannot be ignored, nor can they be retroactively interfered-with, i.e. to deny the motion (plainly) would be *"a wrong which directly results in the violation of a legal right"*.[4]

3. To deny the Motion would (i) be an interference with underlying property rights and the freedoms associated with such alienable property rights; (ii) wrongly seek to retroactively deprive the Plaintiffs-below of those *ejusdem generis* rights, when it is beyond doubt that a corporation may not be deprived of its property without due process: *Smyth v. Ames*, 169 U.S. 466 (1898).[5]

4. As to alienability, a corporation can validly assign a claim, even if made to circumvent the proh-

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[4] See *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Thus the property rights here are US-constitutionally protected from interference.

[5] I.e. to confer standing at US Supreme Court level. Also, see *Kentucky Co. v. Paramount Exch.*, 262 U.S. 544, 550 (1923); and *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

ibition against a corporation appearing for itself.[6] Therefore, plaintiff-rights are alienable species of property capable of transfer. No fetters exist here vis-à-vis the underlying stockholdings (or rights thereto) and no restrictions exist preventing transfer by assignment. Thus, the plaintiff-rights here are free and full. Generally, plaintiff-rights include the right to invoke/defend a claim and invoke/prosecute an appeal, which upon close inspection, first vests when seised in the Court-Below, by virtue of the Court-below's opinion. These rights reflect the Plaintiff-belows' *right* to due process.[7] Strictly, appellate rights are property *ejusdem generis* (and part of plaintiff-rights), thus capable of assignment also and thus *sine qua non* also cannot vest *irrevocably* exclusively-so. Conversely, *sui generis* to hold appellate rights irrevocably exclusive would interfere with the Plaintiffs-belows' (and their assigns') unfettered right viz. free and full enjoyment of their underlying property rights. To deny substitution in the face of a valid assignment would undermine the expectation of rights in a wider context, whereby a right of appeal might be desirous to a hitherto third party but for the assign (for example, insurance clause subrogation rights).[8] An assignment of rights can act to allow plaintiff-substitution at the appellate stage: *CSFB 1998-C2 Park Mill Run L.L.C. v. Garden Ridge Hilliard Delaware Business Trust*

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[6] *Traktman v. City of New York*, 182 AD2d 814 (1991); and *Medical Facilities v. Pryke*, 172 AD2d 338 (1990).

[7] *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (*"a corporation is a 'person' within the meaning of the ... due process of law clauses"*).

[8] And, if the title was unfettered, then so any unreserved assignment or grant etc. An assignee would expect the same substantial rights to pass given the *quid pro quo* that *nemo dat quod non habet*.

2006-Ohio-1535.[9] Therefore, in such circumstances an appeal merely divests a trial court of jurisdiction for the appellate court, and no more.[10]

5. Further, the opinion giving rise to the underlying appeal and Motion ("Opinion") comprises a series of findings directly against Lygren personally which are injurious. Lygren's reputation has been damaged. Lygren's character was hitherto unblemished, and in the past has been found to be credible when tested elsewhere (in a civil jury trial in New York).[11] Damage to reputation is currently at large, ergo the property therein.[12] Reputation is a property right *in rem*, which is also inalienable.[13] Because of this latter feature, that right cannot be transferred in favor of a third party for its enjoyment, and neither

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[9] Court of Appeals, 10th App. Dist.: "*During the pendency of this appeal, we have granted Park Mill Run's motion to substitute in its place as appellee CadleRock's Hilliard Property, L.L.C. ("CadleRock's"), pursuant to an assignment making CadleRock's the real property in interest in the matter.*" [at ¶1, emphasis added].

[10] See *Moore v. Moore*, Del. Supr., 144 A.2d 765 (1958); *King v. Lank*, Del. Super., 61 A.2d 402 (1948).

[11] See *International Minerals and Resources S.A. v. Pappas*, 761 F. Supp. 1068 (S.D.N.Y.1991); 96F.3d 586 96F.3d 586; 2nd Cir. (N.Y.) (1996); 5 Fed.Appx. 5, 2001 WL 196691, 2nd Cir. (N.Y.). Lygren as witness for plaintiffs, where it was found that the defendants there had intentionally and maliciously interfered with the Plaintiffs' contract. It can be safely inferred that at jury trial, Lygren's credibility was preferred.

[12] Under Delaware law (i) as to defamation see *Gill v. Del. Park, LLC*, 294 A. Supp. 2d 638, 646 (D. Del. Dec. 2, 2003); (ii) as to "False Light Invasion of Privacy" the common law right of privacy was first recognized in *Barberi v. News-Journal Co.*, 56Del.67 (1963).

[13] HOLLAND *"Elements of Jurisprudence: 1st American Edition from the 7th English Edition"* (2006) *150, *160.

can that right be transferred the Plaintiffs-below. Thus, only Lygren can restore his character.

6. Moreover, the Opinion's injurious findings were not raised at any time prior to the Opinion, in circumstances where, during a prior judicial case-conference in August 2007, it was explicitly understood that any subsequent hearing would not comprise allegations as to Lygren's credibility (it was agreed at that case-conference, that there would be no "mini-trial" viz. Lygren's credibility). Indeed, the key findings per the Opinion were not explored beforehand during the June 2008 hearing either ("June Hearing"). Lygren was not required to attend the June Hearing. Accordingly the Opinion is an ambush.[14] Lygren has been denied the right to due process, inter alia his opportunity to rebut the Opinion's findings.

7. The right to due process is US-constitutionally protected. By explicitly citing the case of *Microsystems v. Scandinavia Online AB* 226 F.3d 35 (2000), which itself was concerned to ensure due process, *Bryan v. Doar* implicitly recognizes the importance of those safeguards required to ensure due process.[15] Indeed, a full consideration of dictum per *Microsystems v. Scandinavia Online* confirms that the court there was at pains to ensure that due process was not jeopardized, noting *"Of course, exceptions exist to virtually every rule, and courts, from time to time, have endeavored to craft*

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[14] See Affidavit filed herewith for further detail. Also see the App. Br. dated 11/13/08, with amended version dated 11/17/08. The failings here are multiple and manifest, undermining any notion the Court-below was an objective finder of facts or impartial. Fraud on the Court is a finding so rare in the history of Delaware that previous counsel could find only one finding previously.

[15] See *Microsystems* at *17 therein: "We explain briefly why, in either of these events, due process is not at risk" [emphasis added].

exceptions to the rule that only parties may appeal from an adverse judgment" [at *40]. The case here warrants an exception.

8. Moreover, of its own volition the Court-below has chosen to attack Lygren personally, despite his being a non-party. Thus, where those attacks are untested, this Court is thereby estopped from denying Lygren his rights to due process, as an extension of the principle that it is a violation of the US-Constitution's due process clause to enforce a judgment without first allowing an opportunity to be heard sometime before final judgment is entered (*Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918)).[16] Further, a plaintiff who never had an opportunity to introduce evidence in rebuttal was held to have been deprived of his rights without due process of law (*Saunders v. Shaw*, 244 U.S. 317 (1917)).[17]

CONCLUSION.

9. The Court is respectfully referred also to the Affidavit. Three reasons for denying the Motion are cited hitherto by this Court: (i) the rationale in *Bryan v. Doar*, (ii) that Lygren is perpetrating a "transparent attempt" to circumvent the need for counsel; and (iii) that there was consent for a dismissal of the Appeal. For the reasons extolled above, ***Bryan v. Doar*** is amply distinguished (it did not comprise an assignment of rights, and nor were the weighty issues of due

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[16] See also *Baker v. Baker, Eccles & Co.*, 242 U.S. 294, 403 (1917); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236 (1900).

[17] Where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.

process at stake). Aspects (ii) and (iii) are further settled in the Affidavit. As to aspect (ii), by the conduct of the Court-below, Lygren has been denied due process, which has been explored here also: to surmise, Lygren is instigating a transparent attempt to seek due process and no more. As to aspect (iii), there has been no explicit consent to a dismissal and neither can one be inferred in the circumstances, for those reasons set out in the Affidavit.

ATLE LYGREN,
PRO SE

/s/ Atle Lygren
Atle Lygren
Chalet BALYBU,
CH-1936 Verbier,
Switzerland.

DATED: January 27, 2009.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB, and PLENTEOUS CORP., Plaintiff Below-Appellants, v. MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON Defendants Below-Appellees	No. 518, 2008 Court Below: Court of the Chancery in and for New Castle County C.A. No. 18507-VCS

AFFIDAVIT OF ATLE LYGREN

SCOTTSDALE, ARIZONA)
) ss.:
UNITED STATES)

I, ATLE LYGREN, being duly sworn, deposes and says as follows:

1. I am the authorized representative of Plenteous Corporation ("Plenteous") one of the Plaintiff Below-Appellants. I also sit on the board of Parfi holding AB ("Parfi"), itself also a Plaintiff Below-Appellant in this action and I am authorized to act on its behalf.

2. I submit this affidavit ("Affidavit") of my own volition in order to inform the Supreme Court of additional facts which may be helpful further to my application as Applicant for re-argument ("Application"). The Application is made viz. the motion hitherto entered by me as movant dated November 2, 2008, seeking this Court's favor to intervene for the purposes of appeal

and/or stand substituted for a Plaintiff-Below Appellants ("Motion"). The Motion has been denied per the opinion of this Court dated January 12, 2009 ("Motion Opinion"). This Affidavit is filed with the Application. This Affidavit is given to the best of my knowledge, understanding or belief, as the context permits.

3. Produced before me and marked "Exhibit B" is the 8-page exhibit to this Affidavit, divided as follows. I confirm the said documents comprised as Exhibit B are faithful facsimile copies of the copies provided to me by this Court and are exhibited hereto without any material modification other than appending page numbers for the sake of pagination: [♠]

(a) Cover sheet with jurat	146
(b) Letter Supreme Court to Applicant dated Oct. 15, 2008 ("October Letter")	147
(c) Notice to Show Cause dated October 30, 2008 ("Notice")	149
(d) Letter Supreme Court to Applicant dated Nov. 14, 2008 ("Stay Letter")	151
(e) Postal receipt for Notice, dated Dec. 1, 2008 ("Postal Receipt")	—[•]
(f) Lexis/Nexis entries as of Jan. 20, 2009 ("Docket")	—[•]

DEEMED CONSENT TO DISMISSAL OF APPEAL.

4. I was faced with an extremely short timetable in order to promulgate the appeal, further complicated by my business commitments, which required me to travel extensively in the United States during

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[♠] *Nota Bene*: the page references herein have been amended ***mutatis mutandis*** for the purposes of this Appendix to this Petition.

[•] Redacted for the purposes of this Appendix to this Petition.

this period, i.e. away from my usual residence in Switzerland. Accordingly, when I filed the notice of appeal in this matter, at the same time I provided an office contact address (i) in the United States and (ii) also at my residence in Switzerland. The purpose was to ensure that communications in the matter would reach me in a timely manner. On October 15, 2008 the Court sent a letter to both of these addresses informing me that I had until October 27, 2008 for Counsel to be secured, failing which a notice to show cause why the appeal should not be dismissed would be issued ("Notice").

5. On October 30, 2008, this Court prepared the Notice. But, the Notice was not sent to me at that time. In fact, the Notice bearing the date of October 30, 2008 was only received and only in Switzerland on December 1, 2008, more than one month after having been prepared.

6. In the meantime, on November 2, 2008 I prepared the Motion which also comprised an affidavit ("Affidavit-In-Support"). This was deposed in Switzerland. It is my understanding that the mere filing of a Motion does not act to suspend the timetable stipulated in the rules of this Court. It was therefore necessary for me to work quickly in compiling the appeal brief in order that it was ready in time ("Appeal Brief"). The Appeal Brief includes an Appendix which also comprises another affidavit ("Appeal-Brief Affidavit"). The Appeal-Brief Affidavit is dated November 9, 2008. As it records, this was also deposed in Switzerland.

7. I then flew to California on November 10, 2008, during which I continued to work on the Appeal Brief. It became clear to me that another affidavit was required as I noticed that, during a case conference

before Strine VC in August 2007 (which I had not attended), it had been alleged by Counsel for the Defendant-Appellees that I had met with the Defendant-Appellants on "social grounds" in Punta Del Este in South America. This allegation was completely untrue. Indeed, I have never even been to Punta Del Este. I, therefore, believe, that this statement was made purposefully by Counsel for the Appellees-Below to further color the Court-below's opinion of me. It was therefore necessary for me to depose a further affidavit in order to place the matter straight for the purposes of the Appeal Brief ("Supplemental Affidavit"). The Supplemental Affidavit is dated November 13, 2008 and is set out in the Appendix to the Appeal Brief. As it records, it was deposed in Palo Alto, California.

8. The Docket records that the Appeal Brief was subsequently filed on November 14, 2008, together with its Appendix. The Docket shows that shortly thereafter (but 5 days before the Notice was dispatched and 18 days after the Motion to substitute was filed), a letter was sent by the Court informing me that the appeal would be stayed until the Court had decided on (i) the Motion to substitute (ii) Notice to show cause ("Stay Letter"). To repeat: at this stage, the Notice had not even been dispatched.

9. The Docket then shows that on November 17, 2008 the Defendant-Appellees filed their opposition to the Motion ("Opposition"). The Opposition was sent to me via my business address in Texas. I received it on November 20, 2008. I immediately organized my reply thereto, which the Docket shows was filed on Dec. 1, 2008. At this time, I was still in California.

10. Although the Court prepared the Notice on October 30, 2008, in fact the Notice was not dispatched to me until November 20, 2008. The Postal Rec-

eipt per Exhibit B confirms that the Notice did not arrive at my residence in Switzerland until December 1, 2008, more than a month after it had been drafted. I believe that the Postal Receipt was signed-for by the cleaning lady there. Moreover, the Notice was only sent to my address in Switzerland in contrast to the October Letter and the Opposition which were sent to both the Swiss and the US addresses.

11. To surmise, I did not receive the Notice as informed by the October Letter or within a reasonable time after the Notice was dated. In fact, by the time the Notice to show cause dated October 30, 2008 was dispatched on November 20, 2008, I had already filed (i) the Motion 18 days before, and (ii) 5 days before, the Appeal Brief. Indeed, by the time the Notice was received in Switzerland on December 1, 2008 I had undertaken the following actions in a timely manner:

(a) Filed a Notice of Appeal on behalf of the Appellants-Below;
(b) Ordered the transcript from the Court-below;
(c) Procured an independent review (as outlined in the Affidavit-In-Support);
(d) Taken steps to transfer the legal rights in the property in the action;
(e) Filed the Motion to intervene and/or stand substituted;
(f) Filed an Appeal Brief;
(g) Filed an Amended Brief;
(h) Received the Opposition;
(i) Filed a reply to the Opposition.

12. Although the Notice was signed-for in Switzerland, I was not in the Country. I did not return to Switzerland from California until December 14,

2008, by which time the 10-day period had expired. Had I received the Notice in a timely manner and per the sequence of communications suggested by the date on the face of the Notice and the Stay Letter, I would have obviously have focused on answering it. Nevertheless, given the volumes of documents produced by this stage, there was no explicit or implicit consent for dismissal. Indeed, the Motion underscores and sets out the reasons why the Appeal should be promulgated, and this is further demonstrated to substantive depths via the Appeal Brief. Moreover, the Affidavit-In-Support clearly states [at ¶15]:

> *"By the foregoing I take these steps so to preserve this action in the given time constraints, moreover in my desire to mitigate the considerable damage caused to my personal and business reputation by the Opinion. By the Assignment's terms, I do not abjure substitution".*

TRANSPARENT ATTEMPT TO CIRCUMVENT THE NEED FOR COUNSEL

13. The steps I have taken thus far, *per se* have not been taken to circumvent the need for Counsel, but, in the circumstances I find myself, to remedy the untold damages caused to my reputation by virtue of the Opinion and its being published on the Internet. They were also taken due to the proximity between the findings against me and the findings against Plaintiffs and my inability to engage counsel to undertake the appeal. I was not a party to the litigation in the Court-below and I draw this Court's attention to the fact I was not present at the June 4, 2008 hearing ("June Hearing"), neither was I asked to appear, nor did I have the opportunity to defend myself against the character assassination which followed. At no stage was I ever

advised by Counsel that the issue was going to turn on issues of my credibility or that it was contended that I had procured a fraud upon the Court-below.

14. In sum, the key factual findings of Strine VC per the Opinion have never been put to me or tested. Indeed several important aspects found in the Opinion were not even raised at the June Hearing. The fraud findings in the Opinion have been made by mere innuendo and without my having the opportunity to rebut matters. For example, it is a finding of Strine VC that not only I could have, but moreover I should have, directed the sale of certain shares held by the Plaintiff-Appellant Plenteous even though those shares were illiquid. The only justification for such a finding is that I have the pre-requisite expertise to have had the ability to achieve this. This aspect is entirely speculative, and also begs the issue whether I was under any duty to do so.

15. It is further a finding of Strine VC that not only I could have, but moreover I should have, then used the sale proceeds to fund the Swedish Arbitration. Again, this aspect is not only entirely speculative, but also begs the issue whether I was under any duty to do so. At the time, I acted consistently with the information I had and on the basis of what I considered to be my duty to act in the interests of Plenteous by exercising my right to conduct Plenteous' affairs using my own unfettered sound business judgment. Yet, simply because I did not (i) effect a sale of Plenteous stocks, to (ii) then fund the Swedish Arbitration with the purported proceeds, apparently I have perpetrated a fraud on the court, albeit after the fact. Thus, I find myself in the wholly unjust position of being brandished in the harshest terms yet, had I been asked, I would have said that all I tried to do was to preserve Plent-

eous to the best of my sound business judgment at the time. That was my sole intention.

16. Curiously, not once has that business judgment been questioned in formal terms. Verily I cannot see how a court can, especially after the fact, ***sua sponte*** decide what is in the best interests of Plenteous, or in effect interfere with my right to exercise sound business judgment in respect thereof, when I am the person shouldered with that duty – and how, just because a court (presumably) has a different "point of view", that could ever equate to my perpetrating a fraud. For example, at that time, I was simply exercising my judgment in protecting Plenteous' legitimate interests.

17. With the greatest of respect to the Court-below, for example, does it candidly believe it has a better understanding of (i) the Norwegian stock market (where most of the shares in question were trading) than myself, who is Norwegian, and who was actually engaged in that market at the time; (ii) the liquidity of the stocks held by Plenteous, moreover, at that time? At what point, was I supposed to "second guess" what was "acceptable" conduct viz. Plenteous' business affairs with reference to what Strine VC may or may not find acceptable? When did Plenteous, in effect surreptitiously, become a court-administrated business by the Court-below, and to what extent? When did the Court-below decide it could ignore/usurp my sound business judgment? At what point in time did Plenteous become constrained to abandon its primary purpose, i.e. that of being an investment vehicle, in favor of effectively becoming solely a litigation construct?

18. Further, to disagree with my sound business judgment – and after the fact – is one thing, but to then extend this as a "fraud" is another. I ask

this Court to consider a pivotal requirement of fraud: intention. There is no evidence (whether direct or circumstantial) to support any notion of any ***male fide*** intention. Indeed, that aspect has never been explored, because the Opinion's "fraud findings" are an ambush after the June Hearing.

19. The foregoing corroborates why I am so resolved to clear my name. I have been acutely frustrated at the non-resolution of this litigation, but I cannot let the record stand. It is my distinct impression that by its own volition, the Court-below has chosen to attack me directly after the fact, irrespective of the corporate veil. Yet if the Motion Opinion stands, I will be denied the essential *quid pro quo* to place matters for appellate review, when my good reputation has been ambushed. Earlier, on numerous occasions I tried earnestly to convince prior counsel to execute the appeal but to no avail. For example, I did not receive the transcript of the June Hearing from prior counsel until October 8, 2008, less than one week before the appeal notice was due. Further, I have not secured counsel on a contingency basis having in mind the strict timetable and especially also the state of this litigation, namely that prior contingency-counsel considered the Plaintiffs had very little chance of winning "before this judge", prior to their filing a motion to withdraw, which was granted.

20. Moreover, by virtue of my undertaking the appeal process, I am now seeing many documents for the first time. Although this has required a real undertaking on my part, nevertheless it has been an "eye-opener". As time has moved forward, the facts which have come to light have acted to confirm my distinct feeling that for the purposes of appeal at least, I wish to conduct my own affairs. Therefore, the steps

I have taken are not per se intended to circumvent the need for counsel, but to permit this Court to allow me to clear my name without disturbing case law elsewhere, which in the circumstances here, I believe only I can best execute. Thus, for all the reasons raised by me above and before, and contrary to the Motion Opinion, I am asking for the right to due process given the egregious damage caused to my reputation.

/s/ AtleLygren

ATLE LYGREN

Sworn before me this 26th day of January, 2009

/s/ Thomas Walton

Thomas Walton
NOTARY
STATE OF ARIZONA
MARICOPA COUNTY
COMMISSION EXPIRES AUGUST 6, 2010

EXHIBIT B

I CERTIFY THIS DOCUMENT "EXHIBIT B" OF 8 PAGES (INCLUDING THIS PAGE) AND INCLUSIVELY NUMBERED B1* TO B8* IS THE EXHIBIT TO THE AFFIDAVIT OF ATLE LYGREN SWORN BEFORE ME ON 26TH JANUARY, 2009

SIGNATURE:

/s/ Thomas Walton

Thomas Walton
NOTARY PUBLIC
DULY AUTHORISED TO TAKE OATHS
STATE OF ARIZONA
MARICOPA COUNTY
COMMISSION EXPIRES AUGUST 6, 2010

NAME: THOMAS WALTON
ADDRESS: 4159 N. DRINKWATER BLVD.,
SCOTTSDALE ARIZONA 85251

DATE: JANUARY 26TH, 2009

[*Note: For the purposes of this Appendix the numbers **B1-B8** are otiose]

SUPREME COURT OF DELAWARE

[COURT LETTERHEAD]

October 15, 2008

Atle Lygren
Chalet BALYBU
CH-1936 Verbier
Switzerland

Re: *Parfi Holding AB, et al. v. Mirror Image Internet, Inc., et al.*, No. 518, 2008 **E-FILED.**

Dear Mr. Lygren:

The Supreme Court is in receipt of a notice of appeal filed by you in the above captioned matter. The notice of appeal was filed on behalf of Parfi Holding AB, Gunnar Gillberg Plenteous Corps, and Grandsen, LTD.

The Court has requested me to inform you that Delaware law requires that a corporation must be represented by counsel, If the above named corporations intend to participate, the Court expects them to retain Delaware counsel and to arrange for counsel to enter an appearance on their behalf. Furthermore, Mr. Gillberg must either represent himself in this matter or also retain private counsel. You **may not** represent Mr. Gillberg in this matter unless you are a member of the Delaware Bar or have been admitted *pro hac vice* in this jurisdiction. Please have counsel enter an appearance on or before **October 27, 2008**. If an appearance is not entered by October 27 200$, a notice to show cause shall issue why this appeal should not be dismissed.

Furthermore, the notice of appeal does not show service upon counsel for the appellees and the Chancery Court court reporter's office You are directed to file proof of service of the notice of appeal upon both no later **October 27, 2008**.

Very truly yours,

/s/ Cathy L. Howard

Cathy L. Howard

cc: Jesse A. Finkeistein, Esquire

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, and §
PLENTEOUS CORP., § No. 518, 2008
§
Plaintiff Below, §
Appellants, §
§
v. §
§
MIRROR IMAGE §
INTERNET, INC., §
XCELERA.COM, INC., §
ALEXANDER M. VIK, §
GUSTAV VIK and HANS §
MAGNUS FAJERSON §
§ NOTICE TO
Defendants Below, § SHOW CAUSE
Appellees. §

To: Mr. Atle Lygren
Chalet BALYBU
CH-1936 Verbier
Switzerland

You are directed to Show Cause why this appeal should not be dismissed pursuant to Supreme Court Rule 29(b) for your failure to diligently prosecute the appeal by failing to comply with the Clerk's October 15, 2008 letter directing you to have counsel enter an appearance. Please respond in writing to this Notice to Show Cause within 10 days after you receive it. If you do not respond, dismissal of this appeal shall be deemed to be unopposed.

Date: October 30 2008 /s/ Lisa A. Semans

Lisa A. Semans
Chief Deputy Clerk of the
Supreme Court

cc: Jesse A. Finkelstein Esquire

SUPREME COURT OF DELAWARE

[COURT LETTERHEAD]

November 14, 2008

Atle Lygren
Chalet BALYBU
CH-1936 Verbier
Switzerland

Brock Czeschin, Esquire
Richards Layton & Finger
One Rodney Square
Wilmington, DE 19801

RE: *Parfi Holding AB, et al. v. Mirror Image Internet, Inc., et al., No. 518, 2008*

Dear Mr. Lytle and Counselor:

The Court is in receipt of the appellants' opening brief and appendix flied in the above captioned matter. Please be advised that the briefing is stayed pending the Court's ruling on the notice to show cause and any response thereto and the motion to substitute party and any response thereto.

Very truly yours,

/s/ Cathy L. Howard

Cathy L. Howard

[Certificate of postage and LexisNexis docket entries omitted]

EXHIBIT CC
OF PETITIONER'S MOTION FOR REHEARING EN BANC JANUARY 27, 2009

[Order of Delaware Supreme Court of Jan. 12, 2008 is **omitted** here, yet set out at pages 43-46 hereof]

[INTENTIONALLY BLANK]

EXHIBIT DD
OF PETITIONER'S MOTION FOR REHEARING EN BANC JANUARY 27, 2009

[Petitioner's Motion For Substitution to the Delaware Supreme Court dated Nov. 2, 2008 (*with* **Affidavit-in-Support**)]

[INTENTIONALLY BLANK]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP., and GRANDSEN, LTD.,

Plaintiff Below-Appellants,

v.

MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON

Defendants Below-Appellees

No. 518, 2008

Court Below:
Court of the
Chancery in
and for New
Castle County

C.A. No.
18507-VCS

MOTION FOR SUBSTITUTION OF PLAINTIFF-BELOW APPELLANTS[♥]

Atle Lygren as Movant, hitherto a non-party representative of Plaintiff-Below Appellants Plenteous Corp. ("Plenteous") and Parfi Holding AB ("Parfi"), moves the Court to be allowed to intervene for the purposes of appeal and stand substituted for Plenteous and Parfi in the above-captioned action ("Action"). The grounds for this motion are set forth below and supported by an affidavit-in-support attached as Exhibit A hereto ("Affidavit"). The Movant also respectfully asks that the Affidavit be admitted as part of the record, and prays that the Court will allow relief from Rule 34 of the Rules of the Supreme Court of Delaware to the extent required.

[♥] *Nota Bene*: the page references herein have been amended ***mutatis mutandis*** for the purposes of this Appendix to this Petition.

1. The Appeal arises from a hearing ("Hearing"), opinion ("Opinion") and order ("Order") of Strine VC in the Court-below dated respectively June 4, 2008, September 4, 2008 and September 11, 2008. Plenteous and Parfi were represented by counsel ("Counsel"). This motion is made given the injury to the Movant's personal and business reputation, caused or likely to be caused by virtue of the Opinion. In a most venomous and injurious manner the Court-below has inextricably-linked the Movant with a perceived malfeasance. Inter alia, this is a plain error. The grounds for the Opinion are so unsafe as to render it unsound.

2. The prospects for injury are further exacerbated by the Opinion being available on the internet which demonstrably has drawn comments injurious to the Movant.[1] It is therefore asserted that the Movant should be allowed the opportunity to set the record straight and be allowed a fair hearing.[2] The Movant's efforts to compel Counsel to redress matters

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[1] In internet chat rooms, available upon performing a Google search. For example, the following link is a posting on Yahoo, whereby the Movant is perceived as being brandished a *"liar"* by the Opinion: ***http://messages.finance.yahoo.com/Stocks_%28A_to_Z%29/Stocks_X/threadview?m=tm&bn=22955&tid=208389&mid=208398***

[2] The Movant was never given the opportunity to adequately address the injurious accusations that were hurled at him by the Defendants and which found their way into the Opinion. The transcript only records Strine VC making a vague reference to Counsel having the Movant being made available for deposition, which was never acted upon and the Movant was never informed of. In a situation where the Opinion turns on the veracity of the Movant, and especially where accusations of lies had dominated the Hearing (which the Movant did not attend), and the contentious record of this litigation, the Movant was denied the opportunity to defend himself adequately or at all.

have not met with success at the date hereof, to which the Court is referred to the Affidavit. With ample good reason the Movant therefore craves the protection of the Supreme Court. [3]

3. The unusually-fragrant words of the Court-below are wholly naked in pegging the responsibility squarely on the door of the Movant, in harsh unveiled terms. The Court-below's sanctions were made on the basis that the Movant had ". . . ***concocted an affidavit designed to give the court a false impression that dire and unexpected financial circumstances precluded Plenteous from proceeding [with the arbitration]***".[4] The basis for this injurious finding turns on an earlier finding that Movant had personally enriched himself which (apparently) was evidenced by *"Lygren's decision to have Plenteous give $1.3 million to himself in the summer of 2003"* [Movant's emphasis]. Further: *"By that pledge, Plenteous relieved Lygren of a personal obligation to the bank in the amount of $1.3 million. That relief was provided to Lygren WITHOUT CONSIDERATION AND NO RECEIVABLE FROM LYGREN IS BOOKED AT PLENTEOUS"* ("Transaction").[5] This finding is plainly wrong. The

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[3] Good reason? Note Strine VC conveniently ignores the Movant's production of circa 4,000 pages of documents dating back to 1997. Plainly, this is a party clearly signaling that it has nothing to hide.

[4] Movant's emphasis added: see Opinion [page 84 hereof]. See also footnote 84 thereof [page 89 hereof]: yet another example of the words "concoction" and "false": *"The record clearly shows that Lygren concocted a false expla-nation in a bad faith attempt to persuade this court to lift the Stay Order under a false impression as to the material facts"*. The Movant takes issue with Strine VC's assertion of *"record"*. Bluntly, there is no *record* which can be safely relied upon to warrant the extreme sanctions here.

[5] The Opinion, Strine VC's emphasis IN CAPS is retained for effect [page 81 hereof]. The Opinion hinges on finding that (i) consideration WAS required for the Transaction; (ii) IF it had been

Transaction originated from an obligation the Movant took over for consideration in 1998 from Procedo Capital Corp., a sister company of Plenteous. Essentially the same consideration accompanied the Transaction in the summer of 2003. But even ignoring the plain error, the Court-below has failed to adduce any direct evidence which is truly probative towards establishing the malfeasance Strine VC thereafter complains of.[6] But even if the finding vis-à-vis consideration was correct, the Transaction was made *more than a year* before the Movant's affidavit was sworn – a fact which surely can never justify a dismissal, irrespective of the nature of the Transaction. Moreover, the documenttation giving rise to the Transaction was produced by the Movant during an exhaustive and expensive discovery — and all along was therefore in the possession of counsel for all parties in the Action.[7] This further underscores how egregious and manifold the failures are.[8]

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paid, Plenteous WOULD have had the money to pay for the Arbitration; and (iii) moreover, SINCE the Movant did not pay Plenteous the equivalent sum in cash *more than a year* after the Transaction, THEN Plenteous is deserved of the most extreme sanctions possible and the Movant equally deserved of being vilified.

[6] i.e. ***"the representation that it was impossible for Plenteous to fund the Damages Arbitration was clearly false and designed to influence the court into lifting the Stay Order on false pretenses"*** [Opinion: page 82 hereof]. The Movant submits that even if no consideration had been paid, the Court also had a duty to determine whether at the time of the Transaction: (i) the events which occurred ***more than one year later*** (causing the Plaintiffs to seek to lift the stay and the Movant's affidavit of December 1, 2004) were reasonably foreseeable; (ii) moreover, whether there was any DUTY for Plenteous to so crystal ball-gaze; especially when it was free of injunction; and (iii) the Transaction was undertaken for the express purpose of "positioning" Plenteous so that it could not afford to proceed with the arbitration in December 2004.

[7] A further aggravating factor comprises Counsel's failure to (i) bring the documentation to the Court-below's attention in time

4. The Affidavit confirms that at the date hereof, all shareholdings (or rights thereto) in Mirror Image Internet Inc., whether legally or beneficially owned by Plenteous, have been irrevocably transferred to the Movant by way of a grant by deed dated October 28, 2008 ("Deed") and that any and all rights in the Action hitherto enjoyed by Parfi and Plenteous have been irremovably assigned in favor of the Movant by way of a legal assignment dated October 28, 2008 ("Assignment").[9] Supporting material is set out as an exhibit to the Affidavit, as Exhibit B.[10] By virtue of the foregoing the Movant asserts that the Assignment also comprises direct claims and any derivative claims made in the Action pursuant to §327 of the Delaware Constitution 1897.[11] The Movant does not (and by the Assignment cannot) abjure substitution.[12]

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or at all; and (ii) accurately relay Strine VC's enquires to the Movant. See footnote 66 of the Opinion [p.81 herein], with reference to Counsel: *"The plaintiffs promised to provide more information if that was in fact not the reality and have failed to do so"* [Movant's emph.].

[8] For example, it is instructional as to the lack of evidence supporting the Opinion, that among circa 4000-pages of an exhaustive discovery, the Transaction was all the Court could find in support of its corrosive chain of thinking which lead to the dismissal and injurious attacks on the Movant. It is asserted no reasonable finder of fact could arrive at such a conclusion given the paucity of real facts.

[9] A corporation can validly assign a claim, even if made to circumvent the prohibition against a corporation appearing for itself. For example, see State of New York cases Traktman v. City of New York, 182 AD2d 814, 815; Medical Facilities v. Pryke, 172 AD2d 338.

[10] The Deed was effected pursuant to a third-party review undertaken on behalf of Plenteous.

[11] i.e. TITLE 8, Corporations, CHAPTER 1. GENERAL CORPORATION LAW, Subchapter XIII. See also Opinion of Noble VC, Delaware Chancery Court per re Countywide Corporation Shareholders Litigation C.A. No. 3464-VCN (September 10, 2008)

WHEREFORE the Movant respectfully prays that the Court grants relief from Rule 34 of the Rules of the Supreme Court in accepting the Affidavit and enters the attached order.

ATLE LYGREN, PRO SE

/s/ Atle Lygren

Atle Lygren
Chalet BALYBU
CH-1936 Verbier,
Switzerland.

DATED: November 2, 2008.

[**NOTE:** THE ACCOMPANYING DRAFT ORDER IS **OMITTED** FOR THE PURPOSES OF THIS APPENDIX]

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whereby at page 3 an assignment of claims to a third-party is discussed in order to preserve derivative claims.

[12] Cf. Bryan v. Doar, 918 A.2d 1086, Del.Supr. Nov 06, 2006. Moreover, see Marino v. Ortiz, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) at 304: *"We think the better practice is for such a nonparty to seek intervention for purposes of appeal."*

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP., and GRANDSEN, LTD.,	No. 518, 2008
Plaintiff Below-Appellants,	Court Below: Court of the Chancery in and for New Castle County
v.	
MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON	C.A. No. 18507-VCS
Defendants Below-Appellees	

AFFIDAVIT OF ATLE LYGREN

VERBIER)
SWITZERLAND)

I, ATLE LYGREN, being duly sworn, deposes and says as follows:

1. I am the authorized representative of Plenteous Corporation ("Plenteous") one of the Plaintiff Below-Appellants. I am also authorized to sit on the board of Parfi Holding AB ("Parfi"), itself also a Plaintiff Below-Appellant in this action ("Action"). I submit this affidavit ("Affidavit") of my own volition into order to inform the Supreme Court of the facts giving rise to the motion entered by me as movant ("Motion"). This Affidavit is filed with the Motion for the order being sought ("Order"). This Affidavit is given to the best of my knowledge, understanding or belief, as the context permits.

2. Produced before me and marked "Exhibit B" is the exhibit to this Affidavit, divided as follows:

Document Description	**Page Number**[♣]
(a) Cover sheet with jurat	170
(b) Email 10/21/08 to previous Counsel in this matter ("Email")	171–172
(c) Various Background memoranda ("Memo")	173–178
(d) Power of Attorney dated October 15, 2008 ("PoA")	179–185
(e) Parfi board meeting minutes October 13, 2008 ("Minutes")	186–187
(f) Evidence of Acceptance for Parfi Oct. 27, 2008 ("Acceptance")	188–197
(g) Grant by way of deed by Plenteous Oct. 28, 2008 ("Grant")	198–199
(h) Assignment of rights by Plenteous Oct. 28, 2008 ("Assignment")	200–208

3. I confirm the said documents comprised as Exhibit B are faithful facsimile copies of the originals, and without any material modification other than appending page numbers for the sake of pagination.

4. On September 5, 2008 I learned of Strine VC's opinion in this Action dated September 4, 2008 ("Opinion"). The Opinion arose from the hearing before Strine VC on June 4, 2008 ("Hearing"). Plenteous and Parfi were advised and represented throughout by lawyers who appeared on the record for the Hearing and during its preparatory stages ("Counsel").

[♣] *Nota Bene*: the page references herein have been amended *mutatis mutandis* for the purposes of this Appendix to this Petition.

5. The Opinion sat uncomfortably with me. It became clear that an appeal should be promulgated. The grounds for the appeal are not rehearsed here, other than to record that certain documents ("Documents") had not been placed before the Court-below, in time or at all. I believe the Documents are corroborative of facts which directly countermand the findings in Strine VC's Opinion concerning my integrity and forming the basis for his dismissal, and moreover, countermanding those aspects of the Opinion which are highly injurious to my reputation. I believe the Documents had been produced by me to Counsel in connection with discovery. Thus I believe the Documents were in possession of (or at least available to) both Counsel and counsel for the Defendant Below-Appellants at all stages before, during and subsequent to the Hearing.

6. On or about September 24, 2008 I was advised by Counsel that the appeal notice was due no later than October 14, 2008 ("Guillotine"). Upon my request I then received from Counsel a transcript of the Hearing ("Transcript") on October 8, 2008. Accordingly it was not until October 8, 2008 that I first became aware of the definitive factual matrix giving rise to matters. The Transcript surely confirmed to me that an appeal ought be progressed forthwith.

7. Therefore, I asked Counsel immediately to prepare and file the required notice of appeal ("Appeal Notice"). Counsel refused. I was at a loss in terms of what to do. I asked an associate to review matters ("Denizhan Baytug"). I understand Denizhan Baytug qualified as a Barrister at the Honorable Society of Lincoln's Inn in 1992 and obtained a full-practicing certificate from the Bar Council of England and Wales in 1993. I also understand that Denizhan Baytug also

dually-qualified also as a Solicitor to the Supreme Court of England and Wales in or about 1995.

8. Denizhan Baytug set forth several memoranda which are set out in Exhibit B, at pages [173–178 herein]. Denizhan Baytug offered me a memorandum dated October 10 2008. I refer the Court to Exhibit B, page B3. He also suggested that I might consider taking-on this Action personally if I felt strongly that my reputation was besieged.

9. With the Guillotine rapidly approaching I had no option but to file the Appeal Notice myself, on behalf of the Plaintiff Below–Appellants. In order to do this, a properly constituted board meeting of Parfi was held on October 13, 2008 ("Board Meeting"). Mr. Lindbo is a duly-authorized representative of Parfi. I recall that Mr. Lindbo was in London, England and I was in California. Accordingly, the Board Meeting was attended by myself and Mr. Lindbo via telephone and was minuted ("Minutes").

10. I refer the Court to Exhibit B, pages [186–187 herein] where the Minutes are set out. The Minutes record that I was permitted to file the Appeal Notice on behalf of Parfi and to such ends also use such address as I chose to stipulate. The Minutes also record that as a precautionary measure, if Counsel did not act, that the avenue should be held open for me personally to take on an assignment of the Action from Parfi. At that time I was traveling and not sure how such an assignment, if made, might be effected in practical terms. Therefore the Minutes also record the necessary mechanism for formalities' sake.

11. On October 14, 2008 I filed the Appeal Notice and required proof of service with this Court, on behalf of Plenteous and Parfi. I confirm all the require-

ed fees were paid by me. On October 14, 2008 I flew back home to Switzerland from Los Angeles, California.

12. On October 15, 2008 Plenteous effected a power of attorney through me, in favor of Denizhan Baytug, and under seal ("PoA"). The PoA is set out in Exhibit B, pages [179–185 herein]. The PoA is exclusive in its application, albeit restricted in its scope. The purpose of the PoA is per the memorandum dated October 10, 2008 (Exhibit B, pages [173–174 herein]). It was impressed upon me that the transfer of power via the PoA had to be genuine and wholesale, even if limited to the subject matter as mentioned.

13. By virtue of the PoA I am no longer vested of any authority in Plenteous for the conduct of this action or the Swedish Arbitration well known to the Court-Below. Further, the PoA exclusively allows Denizhan Baytug to deal in the shareholdings and rights in the Below-Appellant Mirror Image Internet Inc. ("Mirror Image") that Plenteous owns or claims by virtue of this Action ("Shareholdings"). I refer the Court also to Exhibit B, page [175 herein]. The purpose for granting the PoA was to allow an independent review of the entire matter within the given time constraints ("Review").

14. The Review was undertaken exclusively by Denizhan Baytug I understand on or about October 16, 2008 and was finalized on or about October 21, 2008. The Review findings were produced in summary memorandum form ("Findings"). I refer the Court to Exhibit B, pages [176–177 herein]. The Findings record that if Counsel were not prepared to make their appearance, then certain consequences would ensue for Plenteous, and effected pursuant to the PoA. In this context, Denizhan Baytug emphasized that the performance of the Findings were contingent only upon

Counsel choosing not to enter an appearance. It was impressed upon me that thereafter it would be for me to continue this Action.

15. Accordingly, per the first direction in Findings I immediately wrote an email to Counsel dated October 21, 2008, again urging that they progress the Appeal. I refer the Court to Exhibit B, pages [171–172 herein], where it can be seen thereby I also informed Counsel of the deadline October 27, 2008 which is the date I had been informed of by the Clerk to this Court ("Deadline"). This email also notes that although I had written to Counsel on October 16 and 17, 2008, to my knowledge I had not received any response thereto.

16. As the Deadline approached, it seemed that Counsel was ever-less likely to appear. Accordingly, on September 27, 2008 the proposed assignment agreement was circulated to Mr. Lindbo for his approval, which was forthcoming. Both Mr. Lindbo and I signed the document serving to evidence Parfi's approval of the assignment agreement pursuant to the Board Meeting as evidenced by the Minutes ("Acceptance"). I refer the Court to Exhibit B, pages [188–197 herein]. At this stage, although the assignment was not effected, its was nevertheless capable of being effected by me on behalf of Parfi. I again wrote to Counsel seeking their appearance.

17. Upon the passage of the Deadline, and having gained no intimation or confirmation from Counsel that Plenteous and/or Parfi would be duly represented, the Findings were effected. I refer the Court to Exhibit B, page [178 herein]. Firstly, by way of the Deed all Shareholdings etc. in Mirror Image were irrevocably granted unto me, under seal. I refer the Court to Exhibit B, pages [198–199 herein]. Secondly, in my favor the Assignment was effected under seal by

Parfi by virtue of the Acceptance and Plenteous. I refer the Court to Exhibit B, pages [200–208 herein]. Both the Deed and the Assignment were effected on October 28, 2008.

18. By the foregoing I take these steps in order to preserve this Action as best I am able, not only having in mind the given time constraints, but moreover my sincerest desire to mitigate the considerable damage caused to my personal and business reputation by the Opinion.

19. By the Assignment's terms, I cannot and do not abjure substitution in this Action whether pursuant to the Order or otherwise. Further and for the same reason, neither Parfi nor Plenteous can object to such substitution.

/s/ Atle Lygren

ATLE LYGREN

Sworn before me this 31st day of October, 2008

/s/ Stéphane Riand

NOTARY PUBLIC
Sion, Canton du Valais
Switzerland

EXHIBIT B

I CERTIFY THIS DOCUMENT "EXHIBIT B" OF 26 PAGES (INCLUDING THIS PAGE) AND INCLUSIVELY NUMBERED B1* TO B26* IS THE EXHIBIT TO THE AFFIDAVIT OF ATLE LYGREN SWORN BEFORE ME ON 31st OCTOBER 2008

SIGNATURE:

/s/ Stéphane Riand

Stéphane Riand
NOTARY PUBLIC
DULY AUTHORISED TO TAKE OATHS
Sion, Canton du Valais
Switzerland

NAME: Stéphane Riand

ADDRESS: Avenue de la Saie 33
1950 Sion
Switzerland

DATE: 31st October 2008.

[*Note: For the purposes of this Appendix the numbers **B1-B26** are otiose]

From: Atle Lygren
Sent: Tuesday, October 21, 2008: 4.20 PM
To: 'Michael Paris'; 'McGonicle, Thomas P.'

URGENT NOTICE

Gentlemen:

You have now been afforded an ample opportunity to reflect on matters, where it was hardly my duty to send to you excerpts from the transcripts in order to point out the obvious shortcomings giving rise to the current situation. You have been offered the opportunity to redeem matters on several occasions, none more so than to also mitigate any damage. I am also not impressed that the transcripts were not sent to me until a week before the appeal notice was due.

I do not appear to have received any response to my email October 17 referring to my email October 16, 2008. I cannot urge upon you enough, that time is now of the essence. The Supreme Court of Delaware has given the Plaintiff Below-Appellants until the October 27, 2008 in order for counsel to file an appearance.

Given the foregoing information, will you please communicate your respective positions regarding appearing in the Appeal on behalf of the Plaintiff Below-Appellants, Parfi Holding AB and Plenteous Corp.

For the avoidance of doubt, all rights are reserved to produce this communication (and any response thereto) to any competent Court in this matter.

Please revert.

Yours sincerely
Atle Lygren
For and on behalf Plaintiffs

Atle LYGREN
Ph. +41 27 775 3860
Fx. +41 27 775 3869
Mob. +41 79 220 2288
Chalet BALYBU
CH-1936 Verbier
Switzerland

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MEMORANDUM

October 10, 2008

Dear Atle

RE: Parfi et al -v- Mirror Image Internet Inc. et al.

Regarding your request that I take a look at this matter, note that although I qualified as a Barrister in 1992 and then as a Solicitor in 1995, I am no longer a practising lawyer. This means it would be quite wrong of me to hold myself out in any manner as being competent to offer binding legal advise.

This said, I cannot stand in the way of your observation that the appeal should be preserved. To such ends therefore, you might further consider filing a notice of appeal to the Supreme Court in order at least to preserve the position until your counsel has had a period of time to reflect on matters, and if indeed your counsel does not act to file the said notice. I offer this insight merely as a helpful observation rather than "advise" *per se*.

If I am to offer any useful insight beyond the above, then there is little choice but for my effectively taking-over the running of this matter on behalf of Plenteous Corp., whence a satisfactory power of attorney should be effected. We can discuss the exacting terms in due course, nevertheless as a bare minimum the powers should extend to dealing with any and all of the items comprised per the action. To such ends the power should include all reservations capable of allowing such dispensations as I exclusively may deem appropriate in respect of the shareholdings and rights thereto in Mirror Image enjoyed by Plenteous Corp, whatever their status may be, which at present is a matter of contention. The power should also allow me to deal with both the Swedish and the US aspects of the litigation.

In this manner, I will not be offering any binding legal advice but will instead be in charge of it - and therein lies a wide distinction. We can discuss this upon your return to Europe.

Kind regards

/s/ Denizhan Baytug

Denizhan Baytug

MEMORANDUM

October 15, 2008

Dear Atle

RE: Parfi et al -v- Mirror Image Internet Inc. et al.

Further to our discussions, the terms of the Power of Attorney in this matter and as discussed are acceptable. Pursuant to those terms, I will now begin a review of matters and take action accordingly. This will not be my offering advise, but will be my directly controlling matters.

In the meantime, and stemming from the powers extended, I ask you to continue in your endeavors to secure that counsel appreciate the need for their attendance in this matter in any subsequent appeal. I prevail upon you to act expeditiously in this matter having in mind its nature.

Kind regards

/s/ Denizhan Baytug

Denizhan Baytug

MEMORANDUM

October 21, 2008

Dear Atle

RE: Parfi et al -v- Mirror Image Internet Inc. et al.

Having reviewed matters, I direct that you continue to prevail upon counsel in the United States matter for their attendance in this matter in any subsequent appeal. Further, I direct an alternative strategy having in mind the various exigencies to hand in the event counsel will not see fit to prevail in this matter. I understand that some steps have already been taken to safeguard matters for Parfi Holding AB (Parfi) by Parfi entertaining an idea that the matter is transferred to you.[1]

If counsel is not prepared to act, I am minded to move forward with a two-pronged plan, and I will draft the paperwork to such ends so that it is contingently at-hand. Firstly, the rights to any US litigation in this matter shall be transferred to you personally. You will then have to weigh for yourself whether you will progress matters. Secondly, all holdings enjoyed by Plenteous Corp. (Plenteous) in Mirror Image Internet Inc. (MII), shall be subject of a grant to you by way of deed. Effectively Plenteous will be divested of the US Action and any form of ownership in or over the shares in MII, but will retain the Swedish Action.

---

[1] Although as I understand it, no steps beyond entertaining the idea and reserving for such.

I am happy to record my reasons albeit in summary form: I am so swayed, by the overriding concern that Plenteous is itself preserved. For some considerable period of time it has done its level best to maintain this matter on a number of fronts, even though its primary purpose is an investment- vehicle construct only. Perforce, I am not minded that Plenteous should risk any further sanction in this matter, moreover in circumstances where the persona non grata is you. Unless counsel is prepared to represent Plenteous, I consider it no longer opportune for Plenteous to press this appeal. That your reputation has been called into question confirms my view.

Kind regards

/s/ Denizhan Baytug

Denizhan Baytug

MEMORANDUM

October 28, 2008

Dear Atle

RE: Parfi et al -v- Mirror Image Internet Inc. et al.

Please find attached, completed:

1. Grant by Deed;
2. Deed of Assignment.

Kind regards
/s/ Denizhan Baytug
Denizhan Baytug

POWER OF ATTORNEY

THIS POWER OF ATTORNEY is executed to take effect from 15th October 2008:

(1) PLENTEOUS CORP. a Panamanian Corporation ("Grantor") represented by its duly appointed agent;

and

(2) DENIZHAN BAYTUG a private individual of [ADDRESS REDACTED] United Kingdom ("Attorney").

WHEREAS the Grantor is a party to a legal action in the Delaware State Chancery Court, New Castle County, United States ("Court Action");

WHEREAS the Grantor is a claimant party on the one part against XCELERA.COM, INC., on the other part in a legal arbitration supplicant to the Stockholm Chamber of Commerce ("SCC Arbitration");

WHEREAS Mirror Image Internet Inc., is itself a body corporate incorporated under the laws of the State of Delaware, United States ("Mirror Image");

WHEREAS the Grantor has legally owned shareholdings in Mirror Image ("Shareholdings").

NOW THEREFORE upon the mutual covenants hereinafter set out the Parties have agreed as follows:

"Property" shall mean the Shareholdings any and all rights beneficially or legally owned in the Shareholdings, Court Action and SCC Arbitration howsoever arising whether or not in existence as of the date hereof.

1. GRANT OF POWER GENERALLY

Grantor hereby grants to Attorney full power and authority to do everything necessary in exercising any of the powers granted here as fully as Grantor might or could do, with full power of substitution or revocation, ratifying and confirming all that Attorney shall lawfully do or cause to be done by virtue of this power of attorney and the powers granted herein.

Nothing herein shall oblige the Attorney to act.

2. SPECIFIC POWERS

Solely in respect to the Property, the following powers are hereby granted to the Attorney:

2.1 To exercise or perform any act, power, duty, right or obligation whatsoever that Grantor now has or may hereafter acquire.

2.2 To forgive, request, demand, sue for, recover, collect, receive, hold all such sums of money debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension, profit sharing, retirement, social security, insurance and other contractual benefits and proceeds, all documents of title, all property, real or personal, intangible or tangible property and property rights, and demands whatsoever, liquidated now or hereafter owned by, or due, owing, payable or belonging to, Grantor or in which Grantor has or may hereafter acquire an interest; to have, use, and take all lawful means and equitable and legal remedies and proceedings in Grantor's name for the collection and recovery of them, and to adjust, sell, compromise, and agree for the same, and to execute and deliver for Grantor, on its behalf, and in its name, all endorsements, releases, receipts, or other sufficient discharges for the same.

2.3 To bargain, contract, agree for, purchase, option, acquire, receive, improve, maintain, repair, insure, safeguard, lease, assign, sell, exchange, redeem, transfer, hypothecate and in any and every way and manner deal.

2.4 To make gifts or grants of any kind.

2.5 To make, do, and transact every kind of business of whatever nature, and also for Grantor and in its name, and as its act and deed, to sign, seal, execute, deliver and acknowledge such stock certificates, stock powers, assignments separate from certificate, deeds, conveyances, leases and assignments of leases, covenants, indentures, options, letters of intent, contracts, agreements, closing agreements, certificates, mortgages, hypothecations, bills of lading, bills, bonds, debentures, notes, receipts, evidence of debts, releases and satisfaction of mortgage, judgments and other debts, waivers of statutes of limitation, and such other documents and instruments in writing of whatever kind and nature as may be necessary or proper in the premises, as fully as Grantor might do if done in its own capacity.

2.6 To adjust, settle, compromise or submit to arbitration any accounts, debts, claims, demands, disputes or matters which are now subsisting or may hereafter arise between Grantor or its Attorney and any other person or persons, or in which any property, right, title, interest or estate belonging to or claimed by Grantor may be concerned.

2.7 To commence, prosecute, enforce or abandon, or to defend, answer, oppose, confess, compromise or settle all claims, suits, actions, or other judicial or administrative proceedings in which Grantor is or may hereafter be interested, or in which any property, right, title, interest or estate belonging to, coming to or claimed by Grantor may be concerned.

2.8 To sell, assign, transfer, and deliver all and any shares of stock standing in Grantor's name on the books of any corporation, or to which Grantor maybe, in equity or otherwise, beneficially entitled, and for the purpose to make and execute all necessary acts of assignment and transfer.

2.9 To continue to conduct or participate in any business in which Grantor may be engaged or to carry out, modify or amend any agreement to which Grantor may be a party, and to sell, exchange, modify or terminate such interest to or with such person or persons as Attorney may deem proper and on such terms and with such security as Attorney may deem appropriate; execute partnership agreements, and amendments; incorporate, reorganize, merge, consolidate, recapitalize, sell, liquidate or dissolve any business; elect or employ officers, directors and Attorneys; carry out the provisions of any agreement for the sale of any business interest or the stock in it.

3. RESTRICT1ONS ON ATTORNEYS POWERS

The Attorney shall not divert Grantor's assets to itself its creditors or its estate.

4. REVOCATION

This Power of Attorney may be revoked at will by either the (1) Attorney; or (2) Grantor including through any other duly appointed attorney of the Grantor.

5. GENERAL ENDURE

This Power of Attorney shall endure generally unless and until revoked or upon the death or mental incapacity of the Attorney.

6. EXCLUSIVITY

This Power of Attorney is granted exclusively to the Attorney insofar as the subject matter comprised herein.

Notwithstanding the foregoing, in discharging its powers hereunder nothing herein shall prevent the Attorney from instructing or seeking the assistance of any third party and whether or not such third party already holds any power of attorney generally or specifically elsewhere in respect of the Grantor, provided always that such powers are exercised in the best interests of the Grantor as shall be determined by the Attorney in its absolute discretion.

7. INDEMINTY

The Grantor shall fully indemnify the Attorney against all costs, damages monetary award and such like in respect of any action brought by any third party by virtue of the Attorney exercising its power hereunder, howsoever arising.

8. REASONABLE EXPENSES

The Attorney shall not be awarded any compensation for performing its powers hereunder, save that it shall be reimbursed its expenses from time to time, howsoever arising.

9. AMENDEMENT, CHOICE OF LAW AND SEVERABILITY

This Power of Attorney shall not be waived, modified or amended in any manner except upon the written agreement between the Parties. This Power of Attorney shall be governed exclusively by English law, and the English language shall be the original language in the event of any translation. The English courts shall have exclusive jurisdiction. Each and every clause and sub-clause herein shall be severable. In the event that any section or sub-section herein is deemed unenforceable or unlawful by any competent court of law, then the remainder parts of this Agreement shall endure severally with full force.

10. COPIES

Photographic or other facsimile reproductions of this executed Power of Attorney may be made and delivered by Attorney, and may be relied upon by any person to the same extent as though the copy were an original. Anyone who acts in reliance upon any representation or certificate of Attorney, or upon a reproduction of this power, shall not be liable for permitting Attorney to perform any act pursuant to this power.

IN WITNESS WHEREOF, the parties hereto have executed this Power of Attorney each by entering in manuscript upon each page at the top right-hand-side the symbols "L.S." duly encircled and signed by each.

/s/ Atle Lygren <L.S.>	Verbier
FOR PLENTEOUS CORP.	**Place**
/s/ Isabelle	Verbier
WITNESS OF SIGNATURE	**Place**
/s/ Denizhan Baytug <L.S.>	London, U.K.
DENIZHAN BAYTUG	**Place**
/s/ M. Elaine Baytug	London, U.K.
WITNESS OF SIGNATURE	**Place**

MINUTES FROM BOARD MEETING 01/08 of Parfi Holding AB i konkurs org. nr. 556571-1065

Date:	13 October 2008
Place:	phone
Present:	Sverker Lindbo and Atle Lygren. Gustav Vik was invited by e-mail but responded out-of-time in the given circumstances.

§ 1

Meeting opened

Sverker Lindbo declared the meeting opened.

§ 2

Minutes

RESOLVED that minutes be kept by Sverker Lindbo, to be approved by Atle Lygren.

§ 3

Representation in US legal action

Atle Lygren explained the legal situation after the latest ruling in the Delaware Court of Chancery, and that he was taking all reasonable steps to persuade current counsel to file the appeal and make their appearance. The grounds for the appeal were added to because of an error made by Counsel both during and subsequent to the June 4th hearing. The pressure of time meant that there was little option but to allow Atle Lygren to file the Notice of Appeal, and if necessary take an assignment of the action personally.

RESOLVED to authorise Atle Lygren to file a Notice of Appeal and supporting documentation on behalf of Parfi Holding AB in the Delaware Case of Parfi Holdings AB et. al -v- Mirror Image Internet Inc (Case number 18507)

RESOLVED that Parfi Holding AB shall allow the said Notice of Appeal and supporting documents to bear such address(es) as Atle Lygren in his discretion may reasonably stipulate within such documents.

RESOLVED that if Counsel for the June 4th hearing were unwilling to appear in the anticipated appeal in time, then Parfi Holding AB shall allow the actions in the state of Delaware to be transferred personally to Atle Lygren by way of a subsequent assignment agreement. To such ends it is FURTHER RESOLVED that for the sake of expediency, having in mind the geographic exigencies to hand, that Atle Lygren shall be duly authorised to enter into and bind Parfi Holding AB in any such assignment, provided always that the terms of such are acceptable to Parfi Holding AB, such acceptance shall be evidenced by a document to such ends and signed by at least 2 Directors of Parfi Holding AB.

End

Meeting declared ended

Minutes by:	Approved:
/s/ Sverker Lindbo	/s/ Atle Lygren
Sverker Lindbo	**Atle Lygren**

EVIDENCE IN WRITING OF ACCEPTANCE

FURTHER to the Board Resolution of Parfi Holding AB dated 13th October 2008, whereby it was:

RESOLVED that if Counsel for the June 4th hearing were unwilling to appear in the anticipated appeal in time, then Parfi Holding AB shall allow the actions in the state of Delaware to be transferred personally to Atle Lygren by way of a subsequent assignment agreement, and that for the sake of expediency, having in mind the geographic exigencies to hand, that Atle Lygren shall be duly authorised to enter into and bind Parfi Holding AB in any such assignment, provided always that the terms of such are acceptable to Parfi Holding AB, and that such acceptance shall be evidenced by a document to such ends and signed by at least 2 Directors of Parfi Holding AB.

THEN, further to the above, this document hereby evidences that the undersigned, as two Directors or Parfi Holding AB, and having reviewed the terms of the attached draft assignment agreement, are hereby satisfied of its terms.

/s/ Sverker Lindbo	/s/ Atle Lygren
Sverker Lindbo	**Atle Lygren**

DATED: 27th October 2008.

ASSIGNMENT

THIS AGREEMENT has been executed and signed the day set out below by and between:

PLENTEOUS CORP., a Panamanian Corporation represented by its duly appointed agent and **PARFI HOLDING AB**, a Swedish Corporation represented by its duly appointed officer (hereinafter called "Transferors") of the first part;

and

ATLE LYGREN a private individual of Chalet Balybu, 1936 Verbier, Switzerland (hereinafter called "Transferee") of the second part;

(hereafter called "Parties").

WHEREAS the Transferors are each parties severally in a legal action in the Delaware State Chancery Court, New Castle County, United States ("DSCC");

WHEREAS the said DSCC action number 18507-NC comprises PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD., as Plaintiffs on the one part, against MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON as Defendants on the other part ("US Action");

WHEREAS the US Action comprises a number of tortious actions alleged, duly pled and particularized as direct and derivative actions against the Defendants ("Counts");

WHEREAS the Transferor PLENTEOUS CORP. is a claimant party on the one part with XCELERA.COM, INC., on the other part in a legal arbitration supplicant to the Stockholm Chamber of Commerce ("SCC Arbitration");

WHEREAS the Transferors are each signatory parties severally to a Joint Prosecution Agreement dated 28th October, 1999 subject to the laws of Massachusetts, United States ("JPA");

WHEREAS in a motion heard before the DSCC on 4th June 2008 the Transferors were represented by attorney firms WOLF BLOCK SCHOOR AND SOLLIS-COHEN LLP and NYSTROM BECKMAN & PARIS LLP ("US Counsel");

WHEREAS by virtue of a order of the DSCC per Strine VC dated 11th September 2008, the Counts stand dismissed ("Order");

WHEREAS the Transferors did authorize and permit the Transferee to timeously file on their behalf a Notice of Appeal with respect to the Order ("Appeal Notice");

WHEREAS whereupon the Transferee did file the Appeal Notice as prescribed the rules of the Supreme Court of the State of Delaware ("SCSD");

WHEREAS by a letter dated 15th October 2008 from the Clerk to the SCSD to the Transferee, the Transferors thereby were notified of a requirement to secure legal counsel by the 27th October 2008 in order to progress any appeal arising by virtue of the Appeal Notice ("Legal Counsel");

WHEREAS via the Transferee the Transferors have taken all reasonable steps in order to secure the US Counsel as Legal Counsel prepared to enter onto the

SCSD record with respect to any appeal appearance arising by virtue of the Appeal Notice ("Steps");

WHEREAS at the date hereof, and despite the Steps taken, the Transferors have no Legal Counsel;

WHEREAS Mirror Image Internet Inc., is itself a body corporate incorporated under the laws of the State of Delaware, United States ("Mirror Image");

WHEREAS there is no dispute between the parties to the US Action that the Transferors have legally owned hitherto-identified shareholdings in Mirror Image ("Shareholdings");

WHEREAS by virtue of actions taken by any or all of the Defendants in the US Action, the Defendants thereto allege the Shareholdings have purportedly been made subject to a process known colloquially as a dilution ("Dilution");

WHEREAS by virtue of actions taken subsequent to the Dilution by any or all of the Defendants in the US Action, the Defendants thereto allege the Shareholdings have purportedly been made subject to a process known colloquially as a reverse-split ("Reverse-Split");

WHEREAS an aspect *lis pendens* between the parties to the US Action includes inter alia the purported Dilution and Reverse-Split;

WHEREAS an aspect *lis pendens* between the parties to the US Action includes inter alia the legal and/or beneficial title of the Shareholdings subject to the purported Dilution and Reverse-Split;

WHEREAS an aspect *lis pendens* between the parties to the US Action includes inter the effects (if any) of the purported Dilution and Reverse-Split upon the legal and/or beneficial title of the Shareholdings;

WHEREAS by virtue of the foregoing the Transferors assert they have legally or beneficially continuously owned the hitherto-identified Shareholdings at the date hereof;

WHEREAS by virtue of a board meeting the Transferor PARFI HOLDING AB did resolve to allow the assignment contemplated herein, and that the Transferee as officer of the Transferor PARFI HOLDING AB shall be duly empowered to enter into such an assignment on behalf of the Transferor PARFI HOLDING AB provided that the Transferor PARFI HOLDING AB shall indicate its acceptance of the said assignment by least two directors of the Transferor PARFI HOLDING AB indicating their acceptance in writing and without further board resolution;

WHERAS a draft of this assignment agreement in identical terms hereto has been reviewed by at least by least two directors of the Transferor PARFI HOLDING AB and each has singed a separate document evidencing their acceptance of this Agreement;

WHEREAS by virtue of the foregoing the Transferors each as several owners of rights mentioned above are willing to assign to the Transferee all of rights identified and stipulated herein, and the Transferee is desirous of acquiring the same from the Transferors;

NOW THEREFORE upon the mutual covenants hereinafter set out the Parties have agreed as follows:

Section 1

In consideration arising by virtue of the mutual obligations arising out of this Agreement, and subject always to the limitations and caveats herein, the Transferors each hereby irrevocably assign to the Transferee exclusively any and all legal rights and such other obligations howsoever arising out of all the Counts in the US Action from the date hereof (collectively the "Rights"), such Rights to be held by the Transferee also for the benefit of the Transferors subject to the terms herein.

Section 2

Nothing herein shall be construed to extinguish the right of any Transferor to benefit from the US Actions. For the avoidance of doubt this Agreement shall preserve any and all rights existing in or arising out of the Shareholdings, including also without limitation any rights in or to the said shareholdings which but-for the said purported Dilution and Reverse Split would be in existence at the date hereof.

Section 3

This Agreement shall preserve any all rights hitherto owned or enjoyed by the Transferors to prosecute the US Action including without limitation any and all rights to prosecute any appeal arising by virtue of the Appeal Notice.

Section 4

For the avoidance of doubt nothing in this Agreement per se shall:

(1) be construed so to extinguish any or all of the rights in the US Action or any rights existing in or arising out of the Shareholdings, any rights in or to the said shareholdings which but for the said Dilution and Reverse Split would be in existence at the date hereof;

(2) cause any transfer to the Transferee of any rights or obligations whether owned or enjoyed by any of the Transferors:

(a) in or arising out of the SCC Arbitration;

(b) in or arising out of the US Action prior to the date hereof, save as is strictly necessary to give effect to this Agreement.

Section 5

At each their own cost, the Transferors hereby each undertake to the Transferee to execute and sign any and all documents in order to further the US Action in connection with the Rights, including at all times such documents as may be deemed necessary or desirable by the Transferee or its legal representatives from time to time.

Section 6

Without delay the Transferee shall in its absolute discretion promulgate the US Action without any further cost, payment from either Transferor, whether jointly or severally. For the avoidance of doubt, by virtue of any order or judgment arising out of the US Action, the Transferee shall itself be liable for any costs and awards made against the Transferee as Plaintiff albeit henceforth from the date hereof and without retroaction.

Section 7

In the event the US Action results in any monetary award favor of the Parties then upon receipt of such sums the Transferee shall pay to the Transferors a share of any such Proceeds as have been agreed or as may be subsequently agreed in writing by the Parties. For the avoidance of doubt, in any event the

Transferors shall first allow the Transferee to stand fully reimbursed for its costs without deduction.

Section 8

This Agreement is binding also upon all legal or beneficial assigns heirs or successors of the Parties. This Agreement is several between the Parties and represents the entire agreement between the Parties with respect to the subject matter comprised herein. This Agreement shall not be waived, modified or amended in any manner except upon the written agreement between the Parties.

Section 9

By virtue of this Agreement the Transferee shall be solely responsible for the conduct and prosecution of the US Action and shall not abjure any substitution as party to the US Action. To such ends the Transferee warrants that it shall forthwith take those reasonable steps identified as at its disposal at the date hereof with the intention to procure or cause any or all aspects of the US Action to be substituted in its favor namely that the Transferee shall stand substituted in favor of the Transferors in respect thereto.

Section 10

Save as may be ordered or pronounced by any competent court of law, no act omission or failure by any Party hereto or by any party identified as a litigant in the US Action shall be deemed per se to countermand or invalidate this Agreement, including without limitation any act omission or failure to ascribe the Transferee in the shareholder register of Mirror Image.

Section 11

This Agreement may be assigned by the Transferee to such assigns and in such manner as the Transferee may at any time in its absolute discretion deem appropriate.

Section 12

This Agreement shall be governed exclusively by English law, and the English language shall be the original language in the event of any translation. Each and every section and sub-section of this Agreement shall be severable. In the event that any section or sub-section herein is deemed unenforceable or unlawful by any competent court of law, then the remainder parts of this Agreement shall endure severally with full force.

Section 13

The Parties each warrant to the other that the signatories hereto are duly appointed and have the capacity to enter into and bind the Parties by this Agreement.

Section 14

The Transferors each warrant that the assignment made hereunder is of nominal value only at the date hereof.

THIS AGREEMENT is executed and signed on the date set out below by the Parties and their duly authorized officers as the case may be, also each by entering in manuscript upon each page at the top right-hand-side the symbols "L.S." duly encircled and signed by each.

FOR PARFI HOLDING AB	Place and date
FOR PLENTEOUS CORP	Place and date
ATLE LYGREN	Place and date

GRANT BY WAY OF DEED

THIS DEED is executed on this 28th day of October 2008, by **PLENTEOUS CORP**., ("Donor") IN FAVOUR OF **ATLE LYGREN** ("Donee").

WHEREAS Mirror Image Internet Inc. is itself a body corporate incorporated under the laws of the State of Delaware, United States ("Mirror Image");

WHEREAS there is no dispute that the Donor has legally owned hitherto-identified shareholdings in Mirror Image ("Shareholdings");

WHEREAS the Donor claims elsewhere it is the legal or beneficial owner in those Shareholdings howsoever arising including without limitation by any act of law or any order made by a duly appointed court of law ("Property") and that the Donor has taken no steps itself to otherwise dispose, convert or transfer such Property;

WHEREAS by this Grant by Deed the Donor does transfer the Property to the Donee;

WHEREAS the expression "Donee" herein used shall mean and include all legal heirs, successors, and assignees as the case may be.

THIS GRANT BY DEED WITNESSETH:

THAT by the Grant by Deed the Donor does hereby irrevocably grant by transfer to the Donee the Property with all rights and title absolutely and without encumbrance or reservation.

FURTHER this Grant by Deed shall be deemed to transfer to the Donee all Shareholdings in existence in October 2002 for the avoidance of doubt prior to any purported dilutions and/or purported reverse-splits undertaken in respect thereof whether by or caused by Mirror Image its officers servants or agents as the case may be ("Actions") whether such Shareholdings are owned by the Donor legally or beneficially whether vested or contingent whether by virtue or but for the Actions. FURTHER by virtue of this Grant by Deed the Donor has no right, title, interest or concern of any nature whatsoever in the Property and the Donee shall be free to use and enjoy the Property or transfer or alienate the same to anyone or anything including without limitation by way of sale, gift, pledge, lien, lease or otherwise to anyone in the manner the Donee may stipulate and at all times without any claim, demand and objection by the Donor. FUTHER no act omission or failure beyond the reasonable control of the Donor or Donee in connection with the Property shall be deemed to countermand or invalidate this Grant by Deed including without limitation any act omission or failure to ascribe the Donee as shareholder in the shareholder register of Mirror Image.

IN WITNESS WHEREOF on the date first mentioned above the Donor has signed this Grant by Deed under seal by affixing in manuscript the letters "L.S." and duly encircled.

Executed in England by the person duly authorized to do so, by virtue of which this Grant by Deed shall be governed exclusively by English law wherever possible.

/s/ Denizhan Baytug <L.S.>

PLENTEOUS CORP.

ASSIGNMENT

THIS AGREEMENT has been executed and signed the day set out below by and between:

PLENTEOUS CORP., a Panamanian Corporation represented by its duly appointed agent and **PARFI HOLDING AB**, a Swedish Corporation represented by its duly appointed officer (hereinafter called "Transferors") of the first part;

and

ATLE LYGREN a private individual of Chalet Balybu, 1936 Verbier, Switzerland (hereinafter called "Transferee") of the second part;

(hereafter called "Parties").

WHEREAS the Transferors are each parties severally in a legal action in the Delaware State Chancery Court, New Castle County, United States ("DSCC");

WHEREAS the said DSCC action number 18507-NC comprises PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD., as Plaintiffs on the one part, against MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON as Defendants on the other part ("US Action");

WHEREAS the US Action comprises a number of tortious actions alleged, duly pled and particularized as direct and derivative actions against the Defendants ("Counts");

WHEREAS the Transferor PLENTEOUS CORP. is a claimant party on the one part with XCELERA.COM, INC., on the other part in a legal arbitration supplicant to the Stockholm Chamber of Commerce ("SCC Arbitration");

WHEREAS the Transferors are each signatory parties severally to a Joint Prosecution Agreement dated 28th October, 1999 subject to the laws of Massachusetts, United States ("JPA");

WHEREAS in a motion heard before the DSCC on 4th June 2008 the Transferors were represented by attorney firms WOLF BLOCK SCHOOR AND SOLLIS-COHEN LLP and NYSTROM BECKMAN & PARIS LLP ("US Counsel");

WHEREAS by virtue of a order of the DSCC per Strine VC dated 11th September 2008, the Counts stand dismissed ("Order");

WHEREAS the Transferors did authorize and permit the Transferee to timeously file on their behalf a Notice of Appeal with respect to the Order ("Appeal Notice");

WHEREAS whereupon the Transferee did file the Appeal Notice as prescribed the rules of the Supreme Court of the State of Delaware ("SCSD");

WHEREAS by a letter dated 15th October 2008 from the Clerk to the SCSD to the Transferee, the Transferors thereby were notified of a requirement to secure legal counsel by the 27th October 2008 in order to progress any appeal arising by virtue of the Appeal Notice ("Legal Counsel");

WHEREAS via the Transferee the Transferors have taken all reasonable steps in order to secure the US Counsel as Legal Counsel prepared to enter onto the

SCSD record with respect to any appeal appearance arising by virtue of the Appeal Notice ("Steps");

WHEREAS at the date hereof, and despite the Steps taken, the Transferors have no Legal Counsel;

WHEREAS Mirror Image Internet Inc., is itself a body corporate incorporated under the laws of the State of Delaware, United States ("Mirror Image");

WHEREAS there is no dispute between the parties to the US Action that the Transferors have legally owned hitherto-identified shareholdings in Mirror Image ("Shareholdings");

WHEREAS by virtue of actions taken by any or all of the Defendants in the US Action, the Defendants thereto allege the Shareholdings have purportedly been made subject to a process known colloquially as a dilution ("Dilution");

WHEREAS by virtue of actions taken subsequent to the Dilution by any or all of the Defendants in the US Action, the Defendants thereto allege the Shareholdings have purportedly been made subject to a process known colloquially as a reverse-split ("Reverse-Split");

WHEREAS an aspect *lis pendens* between the parties to the US Action includes inter alia the purported Dilution and Reverse-Split;

WHEREAS an aspect *lis pendens* between the parties to the US Action includes inter alia the legal and/or beneficial title of the Shareholdings subject to the purported Dilution and Reverse-Split;

WHEREAS an aspect *lis pendens* between the parties to the US Action includes inter the effects (if any) of the purported Dilution and Reverse-Split upon the legal and/or beneficial title of the Shareholdings;

WHEREAS by virtue of the foregoing the Transferors assert they have legally or beneficially continuously owned the hitherto-identified Shareholdings at the date hereof;

WHEREAS by virtue of a board meeting the Transferor PARFI HOLDING AB did resolve to allow the assignment contemplated herein, and that the Transferee as officer of the Transferor PARFI HOLDING AB shall be duly empowered to enter into such an assignment on behalf of the Transferor PARFI HOLDING AB provided that the Transferor PARFI HOLDING AB shall indicate its acceptance of the said assignment by least two directors of the Transferor PARFI HOLDING AB indicating their acceptance in writing and without further board resolution;

WHERAS a draft of this assignment agreement in identical terms hereto has been reviewed by at least by least two directors of the Transferor PARFI HOLDING AB and each has singed a separate document evidencing their acceptance of this Agreement;

WHEREAS by virtue of the foregoing the Transferors each as several owners of rights mentioned above are willing to assign to the Transferee all of rights identified and stipulated herein, and the Transferee is desirous of acquiring the same from the Transferors;

NOW THEREFORE upon the mutual covenants hereinafter set out the Parties have agreed as follows:

Section 1

In consideration arising by virtue of the mutual obligations arising out of this Agreement, and subject always to the limitations and caveats herein, the Transferors each hereby irrevocably assign to the Transferee exclusively any and all legal rights and such other obligations howsoever arising out of all the Counts in the US Action from the date hereof (collectively the "Rights"), such Rights to be held by the Transferee also for the benefit of the Transferors subject to the terms herein.

Section 2

Nothing herein shall be construed to extinguish the right of any Transferor to benefit from the US Actions. For the avoidance of doubt this Agreement shall preserve any and all rights existing in or arising out of the Shareholdings, including also without limitation any rights in or to the said shareholdings which but-for the said purported Dilution and Reverse Split would be in existence at the date hereof.

Section 3

This Agreement shall preserve any all rights hitherto owned or enjoyed by the Transferors to prosecute the US Action including without limitation any and all rights to prosecute any appeal arising by virtue of the Appeal Notice.

Section 4

For the avoidance of doubt nothing in this Agreement per se shall:

(1) be construed so to extinguish any or all of the rights in the US Action or any rights existing in or arising out of the Shareholdings, any rights in or to the said shareholdings which but for the said Dilution and Reverse Split would be in existence at the date hereof;

(2) cause any transfer to the Transferee of any rights or obligations whether owned or enjoyed by any of the Transferors:

(a) in or arising out of the SCC Arbitration;

(b) in or arising out of the US Action prior to the date hereof, save as is strictly necessary to give effect to this Agreement.

Section 5

At each their own cost, the Transferors hereby each undertake to the Transferee to execute and sign any and all documents in order to further the US Action in connection with the Rights, including at all times such documents as may be deemed necessary or desirable by the Transferee or its legal representatives from time to time.

Section 6

Without delay the Transferee shall in its absolute discretion promulgate the US Action without any further cost, payment from either Transferor, whether jointly or severally. For the avoidance of doubt, by virtue of any order or judgment arising out of the US Action, the Transferee shall itself be liable for any costs and awards made against the Transferee as Plaintiff albeit henceforth from the date hereof and without retroaction.

Section 7

In the event the US Action results in any monetary award favor of the Parties then upon receipt of such sums the Transferee shall pay to the Transferors a share of any such Proceeds as have been agreed or as may be subsequently agreed in writing by the Parties. For the avoidance of doubt, in any event the

Transferors shall first allow the Transferee to stand fully reimbursed for its costs without deduction.

Section 8

This Agreement is binding also upon all legal or beneficial assigns heirs or successors of the Parties. This Agreement is several between the Parties and represents the entire agreement between the Parties with respect to the subject matter comprised herein. This Agreement shall not be waived, modified or amended in any manner except upon the written agreement between the Parties.

Section 9

By virtue of this Agreement the Transferee shall be solely responsible for the conduct and prosecution of the US Action and shall not abjure any substitution as party to the US Action. To such ends the Transferee warrants that it shall forthwith take those reasonable steps identified as at its disposal at the date hereof with the intention to procure or cause any or all aspects of the US Action to be substituted in its favor namely that the Transferee shall stand substituted in favor of the Transferors in respect thereto.

Section 10

Save as may be ordered or pronounced by any competent court of law, no act omission or failure by any Party hereto or by any party identified as a litigant in the US Action shall be deemed per se to countermand or invalidate this Agreement, including without limitation any act omission or failure to ascribe the Transferee in the shareholder register of Mirror Image.

Section 11

This Agreement may be assigned by the Transferee to such assigns and in such manner as the Transferee may at any time in its absolute discretion deem appropriate.

Section 12

This Agreement shall be governed exclusively by English law, and the English language shall be the original language in the event of any translation. Each and every section and sub-section of this Agreement shall be severable. In the event that any section or sub-section herein is deemed unenforceable or unlawful by any competent court of law, then the remainder parts of this Agreement shall endure severally with full force.

Section 13

The Parties each warrant to the other that the signatories hereto are duly appointed and have the capacity to enter into and bind the Parties by this Agreement.

Section 14

The Transferors each warrant that the assignment made hereunder is of nominal value only at the date hereof.

THIS AGREEMENT is executed and signed on the date set out below by the Parties and their duly authorized officers as the case may be, also each by entering in manuscript upon each page at the top right-hand-side the symbols "L.S." duly encircled and signed by each.

/s/ Atle Lygren <L.S.>	Verbier, 28.10.08
FOR PLENTEOUS CORP.	**Place and date**
/s/ Atle Lygren <L.S.>	London, 28.10.08
FOR PARFI HOLDING AB	**Place and date**
/s/ Atle Lygren	Verbier, 28.10.08
ATLE LYGREN	**Place and date**

EXHIBIT EE
OF PETITIONER'S MOTION FOR REHEARING EN BANC JANUARY 27, 2009

[Respondents' Opposition to Petitioner's Motion For
Substitution to the Delaware Supreme Court
November 17, 2008]

[INTENTIONALLY BLANK]

THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB,
GUNNAR GILLBERG,
PLENTEOUS CORP. and
GRANDSEN, LTD.,

Plaintiff Below-Appellants,

v.

MIRROR IMAGE
INTERNET, INC., XCELERA
INC., ALEXANDER M. VIK,
GUSTAV M. VIK and HANS
MAGNUS FAJERSON,

Defendants Below-Appellees

No. 518, 2008

On appeal from
the Court of
Chancery in and
for New Castle
County

C.A. No. 18507-VCS

APPELLEES' OPPOSITION TO MOTION FOR SUBSTITUTION

Appellees Xcelera Inc., Mirror Image Internet Inc. ("Mirror"), Alexander Vik, Gustav Vik and Hans Magnus Fajerson ("Appellants") oppose the motion of Atle Lygren ("Lygren") to be substituted for Appellants Parfi Holding AB ("Parfi") and Plenteous Corp. ("Plenteous") as sole Appellant (the "Motion").

1. This action was filed more than eight years ago, in November 2000. Lygren has never been a party to the action. On September 4, 2008, the Court of Chancery dismissed the action below after finding that both Plenteous and Parfi lacked derivative standing and after concluding, on a voluminous factual record, that their representative, Lygren, had willfully deceiv-

ed the Court. See Opinion of Vice Chancellor Strine dated September 4, 2008 ("Op") at 33-38.

2. Without any counsel, Lygren filed a notice of Appeal on behalf of Appellants on October 14, 2008. *See* Affidavit of Atle Lygren ("Aff") ¶11. Because Lygren is not a lawyer, the Clerk of the Court notified him that Appellants must be represented by counsel, and directed that counsel appear on their behalf by October 27, 2008 or the Court would issue a notice to show cause. See Ex. A.[1] No counsel appeared by October 27, 2008, nor has counsel appeared since.

3. Lygren admits he has not retained counsel for Appellants. Aff. ¶17. Instead, he seeks to substitute himself as sole Appellant, based on Appellants' purported assignment to him of all claims and shares of Mirror. *Id* ¶17. He apparently seeks also to intervene on his own behalf in order to appeal the "injur[y] to [his] reputation" from the Chancery Court's "venomous and injurious" opinion. *Id* ¶¶5, 8 14; Motion ¶¶1, 2. No legal support exists for either request.

4. First, Delaware provides for substitution in an appeal solely upon death of a party. *See* Del Sup. Ct. R. 31. No other grounds are contemplated for substitution at the appellate level and Appellees' research has revealed no case in which substitution has been permitted in the Delaware Supreme Court on alternative grounds.

5. Second, equity and the sound administration of justice dictate a rejection of the Motion. The

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[1] As Plenteous' representative, however, Lygren was already aware that corporations must be represented by counsel, as the Court of Chancery had advised him of the requirement on multiple occasions in the proceedings below. See, e.g., Transcript of Status Conference date Sept. 26, 2005 (Ex. B), at *7; Apr. 3, 2006 Opinion (Ex. C), at *3-4.

purported assignment is a transparent attempt to circumvent the Court's order that Appellants obtain counsel. *See* Aff. ¶¶7, 9-16 (admitting that after counsel below declined to represent Appellants on appeal Lygren "was at a loss in terms of what to do", but rather than attempt to find counsel, engaged a retired English barrister to "review the situation", and then arranged for Appellants to assign their claims to himself).

6. Lygren's conduct is typical of the byzantine machinations that have led at least two other law firms to withdraw, and the Court of Chancery to conclude that Appellants lacked derivative standing. *See, e.g.*, Op. at 52. Over the eight year history of this case, Parfi has gone bankrupt and Lygren has run Plenteous via Power of Attorney, while disclaiming any ownership in Mirror. *Id.* at 3, 53. Now, rather than comply with the order to find counsel, Lygren has engaged in yet another set of bizarre transactions using his control over Parfi and Plenteous to try to sidestep that order a legal matter, Lygren has not complied with either the order or Rule 31's requirements for substitution. As art equitable matter, the sole purpose of his conduct appears to be to circumvent the law.

7. Further, Lygren's suggestion that these assignments were a necessary alternative due to inability to obtain counsel is without evidentiary basis. Lygren apparently made no attempt to find alternative counsel in the U.S. after Appellants' counsel below declined to represent them on appeal. *See* Aff. ¶¶ 7-16.

8. As a matter of judicial administration, the purported assignments — occurring after the case below was dismissed – are not supported by record evidence and Appellees have no way of testing their validity, enforceability or legality. Allowing the Motion

would place the Supreme Court in the role of factfinder on. entirely new issues outside the record and never considered by the court below and, further, would require this Court to determine if these assignments provide additional grounds for denial of the appeal.[2]

9. Finally, no ground exists for Lygren to intervene. A non-party's interest in the outcome of the litigation is insufficient to confer standing for purposes of appeal. *Fitzgerald v. Vishay Intertech., Inc* ., 918 A.2d 1170, 2007 WL 188887 at *1 n.6 (Del. Jan. 24, 2007); Bryan v Doar, 918 A.2d 1086 1089 (Del. 2006). Nor is "reputational" harm from the Court of Chancery's factual findings an interest warranting intervention See, e.g., *Calloway v Westinghouse Elec. Corp.*, 115 F.R.D. 73, 74 (M.D. Ga. 1987) (a witness' interest in his reputation alone, following a court finding that he is not credible, does not constitute the required interest necessary to allow intervention); ***Edmundson v. Nebraska***, 383 F.2d 123, 126-127 (8th Cir. 1967) (affirming denial of intervention because injury to reputation of non-party based on allegation of fraud did not give rise to legal detriment). Even if it were, Lygren's failure to seek intervention in the court below waived any right to do so now. See Bryan, 918 A.2d at 1089-90 (denying motion for intervention and/or substitution because non-party had not tried to intervene in the trial court).

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[2] For example, assuming *arguendo* that Plenteous owned Mirror shares when the Notice of Appeal was filed (in fact, Plenteous has not owned Mirror shares since 2002, see Op at *40-41), the transfer to Lygren would destroy derivative standing under the continuous ownership rule. See *Lewis v. Anderson*, 477 A.2d 1040, 1046 Del. 1984).

Wherefore, Appellees respectfully request that the Court deny Lygren's Motion and dismiss the appeal.

/s/ Brock E. Czeschin

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Dated: November 17, 2008

EXHIBITS A, B AND C

OF RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR SUBSTITUTION TO THE DELAWARE SUPREME COURT NOVEMBER 17, 2008

[Omitted for the purposes of the Petition]

EXHIBIT FF
OF PETITIONER'S MOTION FOR REHEARING EN BANC JANUARY 27, 2009

[Petitioner's Reply to the Respondents' Opposition to the Petitioner's Motion For Substitution to the Delaware Supreme Court dated December 1, 2008]

[INTENTIONALLY BLANK]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARFI HOLDING AB, and PLENTEOUS CORP.,	No. 518, 2008
Plaintiff Below-Appellants,	Court Below: Court of the Chancery in and for New Castle County
v.	
MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON	
Defendants Below-Appellees	C.A. No. 18507-VCS

REPLY TO APPELLEES' OPPOSTION TO MOTION FOR SUBSTITUTION

1. This case is exceptional. This Court can find abundant safe grounds for distinction here, without disturbing settled case-law applicable elsewhere. Indeed, nothing in the Delaware Constitution prevents the Motion; the cases cited by the Appellees are inapposite; and the Motion is timely.[1]

2. Lygren is the assign and jurisdiction vests in him as Movant.[2] The Appellees have singularly failed

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[1] From research, there is apparently no case on record whereby the same facts have prevented substitution or intervention. The Delaware Constitution is completely silent on the issues here (Del. Const. art IV, § 11). *Cf. United States of America v. LTV Corporation* 746 F.2d 51 (D.C. Cir. 1984) where the would-be appellant Wheeling failed to seek to intervene for the purposes of appeal at the right time.

[2] Set out in the Affidavit supporting the Motion. Those plaintiff rights enjoyed by Plaintiff-below Parfi Holding AB and Plenteous Corp. now vest in Lygren by virtue of the Assignment set out

to consider the fundamental distinction thereby arising.[3] Wherefore here, Lygren does not and cannot abjure substitution (which the Appellees do not appear to take issue), whence this case is absent the factor which ultimately denied the purported appellant his relief in *Bryan v. Doar*.[4] Further, a corporation can validly assign a claim, even if made to circumvent the prohibition against a corporation appearing for itself.[5] This reflects the general notion that underlying plaintiff-rights are alienable species of property therefore capable of transfer save for circumstances whereby such a transfer is lawfully prevented or fettered, for example by way of injunction, statute, private encumbrance or treaty ***inter parte***. There are no such fetters here, including any by way of treaty ***inter parte***, and no fetters exist vis-à-vis the stockholdings (or rights thereto) either. Thus, the plaintiff-rights here are free and full. These rights comprise the right to invoke a claim and invoke and prosecute an appeal (here, as plaintiff); property emanating ***inter alia*** from the Fourteenth Amendment to the U.S. Constitution equally (and thus ***ejusdem generis***) ***mutatis mutandis***.[6] Upon close inspection, an appellate right first vests when

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therein. Shareholdings (and rights thereto) formerly enjoyed by Plenteous in the Appellee Mirror Image Internet, Inc., now vest in Lygren by virtue of the grant by way of deed, also set out therein.

[3] Strictly, appellate rights are property *ejusdem generis* (and part of plaintiff-rights), thus capable of assignment.

[4] At page 4 of Appellees' Opposition: *Bryan v. Doar*, 918 A.2d 1086, 1089 (Del. 2006) [***in this Appendix, at page 214 hereof**].

[5] *Traktman v. City of New York*, 182 AD2d 814 (1991); and *Medical Facilities v. Pryke*, 172 AD2d 338 (1990).

[6] If enjoyment is full and free, it therefore matters not the reasons for the assignments and grants: the Appellees can "huff and puff" all they like to no avail. Also, see ***Grosjean v. American Press Co.***, 297 U.S. 233, 244 (1936) (***"a corporation is a 'person' within the meaning of the ... due process of law clauses"***).

seised in the Court-Below, as plaintiff-rights *ejusdem generis*, and thus *sine qua non* also cannot vest *irrevocably* exclusively-so.[7] Further per the Fourteenth Amendment, to deny the Motion would wrongly seek to retroactively deprive the Plaintiffs-below of those *ejusdem generis* rights, to thus confer standing at US Supreme Court level.[8] Moreover, an assignment of rights can act to allow plaintiff-substitution at the appellate stage: *CSFB 1998-C2 Park Mill Run, L.L.C. v. Garden Ridge Hill-iard Delaware Business Trust, 2006-Ohio-1535* ("CSFB").[9] And quite rightly, given that an appeal divests a trial court of jurisdiction in favor of the appellate court. Thus, to deny the Motion would otherwise provide a mechanism for any defendant to then evade justice, upon learning of a happenstance re-organization of a corporate plaintiff into (say) a "Newco" within 30 days of an adverse final judgment.[10] By the Appellees' logic, Newco as transferee would equally have no appellate standing, notwithstanding any transfer of all underlying rights into Newco, when clearly, it is beyond doubt that a corporation may not be deprived of its property without due process: *Smyth v. Ames*, 169 U.S. 466 (1898).[11] Thus, to deny the assign Lygren the Motion instant in the face of the CSFB case (above), the assignments and the grant, would be a denial ***reductio ad absurdum***.[12]

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[7] Here the appeal right vests by virtue of the Court-below's Opinion ("Opinion"). To hold this appellate right *sui generis* as somehow irrevocably exclusive would interfere with the Plaintiffs-below's (and their assigns') unfettered right viz. free and full enjoyment. And, if the title was unfettered, then so any unreserved assignment or grant etc. Thus, per the Statute of Frauds the assignee would expect the same substantial rights to pass given the *quid pro quo* that *nemo dat quod non habet*.

[8] i.e. to deny the motion (plainly) would be "a wrong which directly results in the violation of a legal right": *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). It would also deny the Movant its rights too.

[9] Court of Appeals, 10th App. Dist.: "*During the pendency of this appeal, we have granted Park Mill Run's motion to substitute in its place as appellee CadleRock's Hilliard Property, L.L.C. ("CadleRock's"), pursuant to an assignment making CadleRock's the real property in interest in the matter*." [at ¶1, emphasis added].

[10] All a defendant would have to do is issue an appeal notice in time: thence the Newco would be unable to take-on the appeal.

3. There exists substantial precedent to confirm Lygren is of ***tested*** good plaintiff character.[13] This is not a case of "credibility of a witness" per the Appellees' Opposition (at ¶2), rather per the Opinion and Movant's Appeal Brief ("App. Br.") a finding that the Movant Lygren (note: not any of the Plaintiffs-below) perpetrated a "fraud on the court".[14] That this finding

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Also, as to Appeal Court jurisdiction see *Moore v. Moore*, Del. Supr., 144 A.2d 765 (1958); *King v. Lank*, Del. Super., 61 A.2d 402 (1948).

[11] In Newco's case the property would be the right of recovery in the judgment amount. Also, see *Kentucky Co. v. Paramount Exch.*, 262 U.S. 544, 550 (1923); and *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

[12] Indeed, *doubly-so*. To deny the Motion would ***reductio ad absurdum*** deprive the assignors ***now*** of their full enjoyment of ***prior*** rights in the property, never mind the assignee's then-right of free enjoyment. The assignment cannot be disturbed and in strict terms therefore, has been rendered moot.

[13] See *International Minerals and Resources S.A. v. Pappas*, 761 F. Supp. 1068 (S.D.N.Y. 1991); 96 F.3d 586 96 F.3d 586; 2nd Cir. (N.Y.) (1996); 5 Fed.Appx. 5, 2001 WL 196691, 2nd Cir. (N.Y.). Lygren as witness for plaintiffs, where it was found that the defendants there had intentionally and maliciously interfered with the Plaintiffs' contract. It can be safely inferred that at jury trial, Lyg-ren's credibility was preferred.

[14] App. Br. dated 11/13/08, with amended version dated 11/17/08. The failings here are multiple and manifest, undermining any notion the Court-below was an objective finder of facts or

pertains to a hitherto non-party plainly makes the finding reviewable for the reasons extolled in the App. Br., and especially where there are instances of plain error. Whereas, this finding has no basis in law or in fact and therefore cannot claim justification, reputation is a property right in rem.[15] As such, damage to reputation, is currently at large.[16] Moreover, the credibility of Lygren was not even *sub judice*.[17] The App. Br. demonstrates that the Opinion was (in effect) an ambush.[18] Also constitutionally-protected, these property and due process aspects further extol the Movant's standing as of right. And to deny for "circular reasoning" would be incongruent, given latterly the US Supreme Court ("U.S. Court") is more liberal in granting standing.[19] *Ass'n of*

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impartial. Fraud on the Court is a finding so rare in the history of Delaware that previous counsel could find only one finding previously (which perhaps explains why the Appellees would rather have this Court trivialize it).

[15] HOLLAND *"Elements of Jurisprudence: 1st American Edition from the 7th English Edition"* (2006) *150, *160.

[16] Ergo the property therein. Under Delaware law (i) as to defamation see *Gill v. Del. Park, LLC*, 294 A. Supp. 2d 638, 646 (D. Del. Dec. 2, 2003); (ii) as to "False Light Invasion of Privacy" the common law right of privacy was first recognized in *Barberi v. News-Journal Co.*, 56 Del. 67 (1963).

[17] By estoppel, given that in the *ultimate* case conference (August 2007), the option of a credibility mini-trial was offered, yet the Appellees failed to take-up that offer [Tr. 08/15/07 p29, at A299 App. Br. Appendix].

[18] Rule 41(b) was not sub judice, as the Hearing June 4, 2008 was heard under Rule 41(e). For the same reason sanction under Rule 60 was not sub judice. These grave issues were not even discussed during the Hearing at any stage. The Hearing's transcript coversheet even states *"Argument on ... Rule 41(e) Motion"*.

[19] The "legal right" language per the US Supreme Court ("U.S. Court") was circular: if the plaintiff is given standing to assert his claims, his interest is protected; if standing is denied, there is no

Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); when "injury in fact" to some interest "economic or otherwise" is arguably within the zone of interest to be protected by the constitutional provision in question. [20]

4. The foregoing aspects extol the Motion as of right in the first instance or in the alternative as a matter of this Court's discretion. To further aid this latter feature, a review of the App. Br. highlights the strong public policy aspects here. Firstly, this Court will be afforded an opportunity to set out directions for motion practice for hearings under both Chancery Court Rules 41 and 60. Second, it will allow this Court to consider "Fraud on the Court" and especially the evidential burdens in respect thereto. Third, it will allow for a review of the test to be applied between balancing an excruciating and much-delaying order for discovery, especially (per here) when launched on the back of the thinnest of defendant motions, as against the right for a plaintiff to promulgate its case, especially (per here) in the face of a toothless stay order. Finally, it will allow this Court to determine, with sanction if necessary, the extent to which a defendant's counsel is allowed to lie or perpetrate deliberate hyperbole upon a court, so that a defendant evades justice.[21]

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protection, as injury had to be "one of property ... one protected against tortious invasion". *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137-138 (1939). The U.S. Court now finds standing not grounded in property rights per "Zone of Interest" (see for example *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951)).

[20] See also *Barlow v. Collins*, 397 U.S. 159 (1970). "Zone of Interest" is a prudential rather than constitutional test. Thus, although in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the U.S. Court refers to injury as "an invasion of a legally-protected interest", here, it would be any interest this Court finds protectable.

[21] As to Defendant Counsel's Deliberate Hyperbole and Falsehoods see App. Br. p11, 13 et seq. respectively.

5. To assist further, the cases cited by the Appellees can be readily distinguished as inapposite.[22] Firstly, in *Edmondson*, the purported-appellant Edmondson was dead (and therefore rightly had no reputtion to injure) — and in any event, if fraud had been found, Edmondson's estate would have benefited to the tune of $450,000. Secondly, the cases *Calloway and Microsystems v. Scandinavia Online AB* 226 F.3d 35 (2000) were always concerned to ensure that due process mechanisms were in place (as indeed they were there). By contrast here, it is impossible to hold the same, given the Opinion is clearly an ambush after the event.[23] Finally, the Movant seeks review only of items *res judicata* or touched by plain error. If the assigns/grant impact derivative standing, this can be attacked by the Appellees upon remand subsequent to appeal.[24] Therefore, ¶8 of the Appellees' Opposition is rendered moot for present purposes.

ATLE LYGREN, PRO SE
/s/ Atle Lygren

Chalet BALYBU,
CH-1936 Verbier,
Switzerland.

DATED: December 1, 2008.

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[22] ¶9 of Appellees' Opposition. *Edmondson v. Nebraska* 383 F.2d 123 (1967); *Calloway v. Westinghouse Elec. Corp.*, 115 F.R.D. 73 (1987). Note: *Fitzgerald v. Vishay*: 918 A.2d 1170, 2007 (Del.Supr.) adds nothing here.

[23] *Microsystems* is cited in *Bryan v. Doar*, supra at footnote 4. For example, see *Microsystems* at *17 therein: "We explain briefly why, in either of these events, due process is not at risk" [emphasis added].

[24] I.e. section 327 of the Delaware Constitution. The plain errors here are factual and legal. Plain error allows issues not presented at trial to be considered: *Sandt v. Delaware Solid Waste Auth.*, Del. Supr., 640 A.2d 1030 (1994).

[INTENTIONALLY BLANK]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP., and GRANDSEN, LTD.,

Plaintiffs,

v.

MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,

Defendants.

C.A. No. 18507-NC

DEFENDANTS' RULE 41(e) MOTION TO DISMISS FOR FAILURE TO PROSECUTE

Pursuant to Rule 41(e) of the Delaware Chancery Court Rules, defendants Mirror Image Internet, Inc., Xcelera.com Inc., Alexander M Vik, Gustav Vik and Hans Magnus Fajerson ("defendants") hereby submit this motion and accompanying Memorandum of Law and Affidavit of Peter J Macdonald in support thereof to dismiss this ease against all plaintiffs. As set forth more fully in the Memorandum of Law, the grounds for defendants' motion are as follows.

1. This case has been inactive for more than one year. The Court stayed the case over a year ago pending completion of the arbitration proceedings in

Sweden Plaintiffs have not commenced the Swedish Arbitration.

2. Plaintiffs have not provided a reason for their inaction, despite requests by the Court that they do so.

WHEREFORE, defendants respectfully request that the Court enter an order dismissing this case with prejudice.

/s/ Brock E. Czeschin

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Dated: February 14, 2005

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP., and GRANDSEN, LTD.,

Plaintiffs,

v.

MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,

Defendants.

C.A. No. 18507-NC

(draft)

ORDER

The Court, having considered defendants' Rule 41(e) motion to dismiss for failure to prosecute, and good cause having been shown:

IT IS HEREBY ORDERED this __ day of ____, 2005, that defendants' motion is GRANTED and the complaint herein is DISMISSED WITH PREJUDICE.

____

Vice Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP., and GRANDSEN, LTD.,

Plaintiffs,

v.

MIRROR IMAGE INTERNET, INC., XCELERA.COM, INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,

Defendants.

C.A. No. 18507-NC

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RULE 41(e) MOTION TO DISMISS FOR FAILURE TO PROSECUTE

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Dated: February 14, 2005

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[Note: Page references above are amended *mutatis mutandis* for the purposes of this Appendix to the Petition]

PRELIMINARY STATEMENT

On February 12, 2004, the Court stayed this action pending completion of the proceedings in the Swedish Arbitration. The Court had noted that plaintiffs' "strategy" of whipsawing defendants between the Arbitration and this case "calls out for some action". See Opinion dated February 12, 2004 ("Op.") at 33. That action was to issue a stay, the duration of which would be determined by plaintiffs' prosecution and completion of the Arbitration. During the ensuing year, however, plaintiff Plenteous has not even initiated the Swedish Arbitration.[1] Nor, despite repeated requests from this Court, have plaintiffs provided an explanation for their inaction. Instead, after months of delay, plaintiffs promised the Court that the Arbitration would be underway by October 18, 2004. Plenteous then failed to commence the Arbitration by that date Plaintiff's counsel then told the Court that they would investigate the reason for that failure, and provide the Court with an explanation. To date, they have not done so. In light of plaintiffs' unexcused delay, and the tactics of plaintiffs that gave rise to this Court's decision to stay this action a year ago, this case should be dismissed with prejudice.

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[1] Although plaintiff Plenteous is the sole claimant to any damages phase of the Swedish Arbitration, in reality, the Swedish Arbitration is a coordinated effort among all four plaintiffs. *See* Opinion dated February 12, 2004 ("Op ") at 8 n 2 ("The plaintiffs in this action and the claimants in the Arbitration have collaborated jointly to obtain relief from Xcelera for injury they claim to have suffered from the Challenged Transactions); *see also id* at 27 ([C]laimants in the Arbitration are in all material respects identical to the plaintiffs here").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case has been pending since November 15, 2000. Plaintiffs filed it seven months after initiating an arbitration in Sweden against defendant Xcelera Inc. based on the same underlying facts and theories of damages. The duplicative nature of the two actions led the defendants in early 2001 to move to dismiss this case for lack of subject matter jurisdiction on the ground that the claims were subject to the arbitration in Sweden. This Court granted summary judgment in defendants' favor following extensive briefing, which included party submissions regarding the Arbitral Tribunal's September 26, 2003 Award that concluded the liability phase of the Swedish Arbitration. Plaintiffs successfully appealed this Court's decision[2] and in December 2002, the Supreme Court of Delaware remanded the case back to the Court of Chancery after reversing.

Since the remand, plaintiffs have done little to prosecute this action. They filed an amended complaint in January 2003 — over two years ago. In 2003 they also served four notices of deposition (but never actually took a deposition) and engaged in a meet and confer with defendants. In October 2003, they procured an extension of the pre-trial schedule based on their decision to hire new lead counsel, the law firm of Lieff Cabraser, Heimann & Bernstein, LLP.

From the time of Lieff Cabreser's involvement in the case in October 2003 until February 12, 2004, when this Court stayed these proceedings, plaintiffs did nothing to prosecute this action. Plaintiffs propounded no discovery, sought no depositions, took no depositions, and made no motions Indeed, on February 5, 2004, a week before the Court stayed the case, plaintiffs requested that defendants agree to another extension of the pre-trial schedule

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[2] Defendants will not reprise here the details of this case's somewhat tortured procedural history or underlying claims, facts and arguments. The Court's own February 12, 2004 opinion provides a comprehensive recitation of that history up to the point when the Court stayed the case.

On October 20, 2003 defendants moved for a preliminary injunction enjoining plaintiffs from pursuing the damages phase of the Swedish Arbitration. Defendants filed that motion after plaintiff Plenteous's Swedish counsel, Olof Nilsson of the Cederquist firm, sent a letter to Xcelera's Swedish counsel threatening to initiate the damages phase of the Swedish Arbitration "seeking from the Arbitrators exactly the same remedy that it seeks from this Court as compensation for its fiduciary duty claims attacking the Challenged Transactions" — a position that was "at the very least, in tension with the arguments advanced by the plaintiffs to this court and to the Supreme Court when the plaintiffs were trying to establish that their fiduciary duty claims were not arbitrable". *See* Op. at 23.

Though the Court denied defendants' motion to enjoin arbitration, it stayed this case *sua sponte* on February 12, 2004 after concluding that plaintiffs' "strategy calls out for some action". Op. at 33. That strategy included not only seeking to "proceed on all fronts at once" and thereby subjecting defendants to the risk of inconsistent judgments, but also exhibiting a lack of candor before both this Court and the Delaware Supreme Court. *See id* at 24 (detailing "inaccurate" and "incorrect" statements made by plaintiffs to both courts), 27 (assuming that the Delaware Supreme Court "recognized that the plaintiffs had attempted to do what they said they had not"), 31 (observing that plaintiffs had been "less than completely straightforward in their previous arguments to this court"), 33.

In its opinion staying this case, the Court stated, "[t]his action shall be stayed in all respects until the completion of all proceedings in the Arbitration, including the expiration of any right, if any, on the part of any party to the Arbitration to seek review of the Arbitrators' final judgment". *Id* at 33. All parties understood that these proceedings would not resume until plaintiffs had completed the Swedish Arbitration. With that knowledge, plaintiffs have done nothing, not even commencing the Swedish Arbitration Further, they have failed to provide the Court requested explanations for their inaction.

On June 28, 2004, pursuant to Court of Chancery Rule 40, the parties received notice that the Call of the Calendar for the Court of Chancery before Vice Chancellor Shine would be held on September 13, 2004, and that a status report was required to be e-filed by August 10, 2004. The notice expressly stated that "[t]his request for a status report constitutes notice pursuant to Court of Chancery Rule 41(e) that the Court may dismiss this action if no action has been taken in this case for a year and an adequate excuse for inaction is not provided in the status report and, if required, at the Call of the Calendar". Plaintiffs responded by noting that the Court had stayed the proceedings pending completion of all arbitration proceedings in Sweden, and representing, "[t]he parties [sic] are in the process of initiating those proceedings, and will advise the Court as soon as a schedule can be obtained from the Arbitration Panel". See Status Report, dated August 5, 2004 (Exhibit A).

At the Call of the Calendar on September 13, 2004, defendants' counsel told the Court that although plaintiffs had stated in their Status Report in early August that they were "in the process of initiating" arbitration proceedings, no proceedings had commenced. This was so even though the case had been stayed for seven months and the Arbitral Tribunal had issued its opinion on liability nearly three years before, on September 26, 2001. Plaintiffs' counsel could offer no explanation for why the arbitration proceedings remained inactive. Nor was plaintiffs' counsel able at the Call of the Calendar to say when the arbitration proceedings might be initiated. The Court indicated that it would consider dismissal if in fact, the Swedish Arbitration had not yet been initiated. The Court then ordered the parties to submit written details of the status of the Swedish Arbitration within two weeks.

On September 23, 2004, plaintiffs' counsel submitted a letter purporting to provide such a report. *See* Letter from plaintiffs' counsel to Vice Chancellor Strine, dated September 23, 2004 (Exhibit B). That letter simply summarized an enclosed letter dated September 20, 2004 from Plenteous' Swedish counsel Olof Nilsson to plaintiffs' counsel Daniel Chiplock, which contained little "detail" and no explanation for plaintiffs' failure to initiate the arbitration in the months since the case had been stayed. *Id.* Both letters acknowledged that the arbitration proceedings had not been initiated, but represented that plaintiffs would file their request for arbitration by October 18, 2004. *Id.* Both letters were silent on what prior efforts plaintiffs had made to commence the Arbitration, if any.

Plaintiffs, in fact, did not commence the Swedish Arbitration by October 18, 2004. Nine days after that date, the plaintiffs sent another letter, informing the Court that Plenteous "ha[d] been unable to initiate a formal request for arbitration as previously represented". *See* Letter from plaintiffs' counsel to Vice Chancellor Strine, dated October 27, 2004 (Exhibit C). Understandably, plaintiffs' counsel expressly disclaimed any involvement in the Swedish arbitration proceedings, and stated that they were:

> gathering the necessary information from Plenteous and its Swedish counsel to explain both the reasons why Plenteous has not initiated the arbitration, as well as Plenteous' next steps We will submit detailed declarations from both Plenteous and its Swedish counsel regarding the same as soon as possible.

Id.

In the nearly four months since they submitted that letter, plaintiffs have never provided the promised explanation, much less submitted "detailed declarations," from either Plenteous or its Swedish counsel Plaintiffs have not even provided the Court with an explanation for their failure to provide the promised information. In short, plaintiffs have never explained to this Court why Plenteous declined to initiate the Swedish Arbitration.

ARGUMENT

1. LEGAL STANDARD FOR DISMJSSAL UNDER COURT OF CHANCERY RULE 41(e)

Delaware Court of Chancery Rule 41(e) permits the Court, in its discretion, to dismiss a case for inaction unless the plaintiff provides a good reason for the delay. It provides,

> Subject to the provisions of rules 23, 23.1 and 23.2 in each cause pending wherein no action has been taken for a period of 1 year

> the Court may upon application of any party, or on its own motion, and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given, or the parties have stipulated with the approval of the Court as to such matter.

Del.Ch.Ct.R.41(e).

Rule 41 operates in tandem with Court of Chancery Rule 40, which provides for an annual calendar call of all cases pending in the Court of Chancery. *See Michaels v Lesser*, 275 A.2d 797, 798 (Del. Ch 1971);[3] see also Del.Ch.Ct.R.40. The call is "primarily for the purpose of determining whether there has been any undue delay in connection with pending matters". *Michaels*, 275 A.2d at 798. Counsel are advised in the notice of the Call of the Calendar that at the call the Court will take such action as is deemed to be in the proper administration of justice, and this includes dismissal of a case. *Id. See also* Del.Ch.Ct.R.40. Prior to the Call of the Calendar, counsel in each case that has been pending for more than two years are routinely required to write to the Court and to give the status of each case. *Michaels* 275 A.2d at 798. Rule 40 further puts attorneys on notice that at the Call of the Calendar, "attorneys will be expected to be present and explain the status of the case and any apparently unusual delay". Del.Ch. Ct.R.40(c).

The annual Call of the Calendar "serves the salutory purpose of enabling the Court to review both all of its cases and each of its cases". *Michaels*, 275 A.2d at 799. This enables the Court to determine whether there has been any undue delay in connection with a case. *Id.* Such a periodic review "is essential if the

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[3] Decisions cited herein are attached at Exhibit D.

Court is to control and manage its docket in a way consonant with its responsibility to all litigants". *Id.* Failure to provide a good excuse for the delay permits the court to dismiss the case at its discretion. *See Jaeger v Muscat,* 221 A.2d 607, 608 (Del.Ch.1966), see also *Council 81, AFCSME v New Castle County,* 1988 WL 947 44, at *2 (Del Ch Sept 16, 1988). A "necessary corollary" of the "undue delay" determination is that counsel are also required to reasonably follow up any commitment made to the Court in connection with the Call of the Calendar. *See Michaels,* 275 A.2d at 799; *see also Jaeger,* 221 A.2d at 608 (dismissing case pursuant to Rule 41(e) where plaintiff failed to take action within 30 days after being directed to do so at annual Call of the Calendar). When that is not done, and when there has been no action for a period of one year, a Rule 41(e) motion is an appropriate way to bring the matter to the Court's attention. *Id.*

II. THIS CASE SHOULD BE DISMISSED BECAUSE IT HAS BEEN INACTIVE FOR MORE THAN ONE YEAR AND BECAUSE PLAINTIFFS HAVE FAILED TO PROVIDE AN EXCUSE FOR THEIR DELAY.

This case should be dismissed. Essentially, plaintiffs have initiated no activity in the case since the fall of 2003. More specifically, plaintiffs have failed to initiate the Swedish Arbitration in the year since this Court stayed these proceedings and failed to provide this Court with any explanation for their inaction. Further, even if plaintiffs could come up with a belated excuse for their conduct now, the Court should take into account plaintiffs' track record in this case — namely, a history of less than candid representations made to this Court each time they have been faced with a potentially negative dispositive outcome.

Delaware law provides ample authority for the Court to exercise its discretion to dismiss this case. First, as required by Rule 41(e), this case has been inactive for more than one year. *See Council 81*, 1988 WL 94744, at *2 (invoking Rule 41(e) in denying plaintiff leave to amend where, after appealing Secretary of Labor decision to Delaware Supreme Court, case was remanded for lack of jurisdiction and transferred to Court of Chancery, plaintiff had waited over one year to file complaints; Rule 41(e) dismissal was warranted because the plaintiff "waited for over one year before filing the instant complaints" and " [n]o reason was given for this inaction ").

Second, plaintiffs have repeatedly failed to provide this Court with any excuse for their delay. As detailed above, although they were on notice prior to the Call of the Calendar on September 13, 2004 that they would be required to explain any apparent delay in the proceedings, plaintiffs' counsel was unable to explain why the arbitration proceedings had not been commenced or when they might be. In response to the Court's request for a detailed status report in two weeks or possibly face dismissal, plaintiffs' counsel gave no explanation for the delay, and instead represented that arbitration would commence by October 18, 2004. *See* Exhibit B. After plaintiffs failed to initiate the arbitration by that date, however, plaintiffs' counsel submitted a new letter, admitting that plaintiff had not initiated the arbitration and representing that counsel would follow up with both plaintiffs and their Swedish counsel and provide the Court with an explanation and written declarations. *See* Exhibit C. No explanation ever followed. A plaintiffs failure to "reasonably follow up any commitment made to the Court in connection with the calendar call" together with inactivity for more than one year, supports a Rule 41(e) motion. *See Mich-*

aels, 275 A.3d at 799, *Jaeger*, 221 A.2d at 608 (dismissing case after more than a year's inaction and without good cause for delay where plaintiff failed to take action as directed at annual calendar call). Here, as in *Michaels* and *Jaeger*, good reason for inaction has not been given by plaintiffs Indeed, no reason has been given, despite ample opportunity and multiple promises by plaintiffs' counsel to do so.

Third, plaintiffs have been on formal notice since June 28, 2004 that this case was subject to dismissal, notice which this Court made explicit at the September 13, 2004 Call of the Calendar. See Exhibit B (enclosing Letter from Olof Nilsson to Daniel Chip-Lock acknowledging potential of dismissal). Accordingly, plaintiffs' repeated failures to commence the arbitration or provide an explanation for their inaction have been made while on notice of possible dismissal and at their own risk. *See, e g, Michaels,* 275 A.2d at 799 ("Rule 4 1(d) is to serve a purpose, and I think that it is essential to the orderly administration of the business of this Court, then there must be action to prosecute within the one year unless good reason for inaction is shown Unless a plaintiff meets that test, then he runs the risk of dismissal under the Rule").

Finally, plaintiffs' delay and lack of any explanation should be evaluated in light of their track record in this case. Thus, while Rule 41(e) dismissal would be appropriate based on plaintiffs' inaction and failure to provide an excuse for their delay, it is even more so when plaintiff history of sharp tactics and less than perfect candor are considered. This Court's opinion staying the litigation detailed both those tactics and the lack of candor, indeed, the Court's decision to stay the litigation was based, in part, on its belief that those tactics should not go unaddressed. *See* Op. at 33.

Delaware courts have not been reluctant to exercise their discretion in cases such as this where the plaintiff has a history of behavior warranting dismissal. In *Council 81*, the Court concluded that, given plaintiff's "track record" of filing defective complaints, granting leave to amend a complaint that plaintiff waited over a year after remand to file "would undermine Rule 41 by rewarding the very unexcused lack of diligence that the Rules is designed to prevent". *Council 81,* 1988 WL 94744, at *2. Here, plaintiffs have after one year not even begun the process the conclusion of which constitutes the triggering point for resumption of this action, As in *Council 81*, if the Court permits plaintiffs' unexplained failure even to commence the arbitration both prior to the Call of the Calendar and after it, it will reward the "the very unexcused lack of diligence" that Rule 41(e) is designed to prevent.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court dismiss this action with prejudice against all plaintiffs.[4]

/s/ Brock E. Czeschin

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[4] Pursuant to Del. Ch Ct Rule 23.1, defendants have filed contemporaneously herewith the Affidavit of Peter J Macdonald stating that no compensation in any form has passed directly or indirectly from any defendant to Plenteous or Plenteous's counsel and that no promise to give any such compensation has been made in connection with the dismissal proposed. However, defendants respectfully submit that this case should dismissed with respect to all plaintiffs given that "the claimants in the Arbitration are in all material respects identical to the plaintiffs here". Op. at 27.

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Counsel for the Defendants Xclera Inc., Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson

Dated: February 14, 2005

EXHIBIT A
OF DEFENDANTS' RULE 41(e) MOTION TO DISMISS FOR FAILURE TO PROSECUTE FEBRUARY 14, 2005

[Omitted for the Purposes of this Appendix]

EXHIBIT B
OF DEFENDANTS' RULE 41(e) MOTION TO DISMISS FOR FAILURE TO PROSECUTE FEBRUARY 14, 2005

[*Including* Letter of Olof Nilsson of Swedish Law Firm "Cederquist" dated September 20, 2004 ("**Status Report**" for the purposes of the Petition)]

YOUNG CONAWAY STARGATT & TAYLOR, LLP

[FIRM'S LETTERHEAD]

October 27, 2004

VIA E-FILE

The Honorable Leo E Strine, Jr
Court of Chancery
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

Re: **Parfi Holding AB, et al. v Mirror Image Internet, Inc., et al. Del. Ch. Civil Action No. 18507-NC**

Dear Vice Chancellor Strine:

Pursuant to the Court's request for a detailed report concerning the status of arbitration proceedings in Sweden by Plenteous Corporation ("Plenteous"), one of the Plaintiffs in the above-captioned case, enclosed please find a letter from Plenteous's Swedish counsel to Plaintiffs' co-counsel.

As that letter indicates, Swedish counsel have been in the process of preparing Plenteous's case in full detail prior to the initiation of arbitration proceedings. The undersigned counsel, as well as Plaintiffs' co-counsel, are not involved in the Swedish arbitration proceedings Plenteous has already selected its arbitrator to those proceedings, and anticipates making a formal request for arbitration, which will result in the convening of a full arbitration panel, on or before October 18, 2004

Thank you for your kind attention to this matter.

Respectfully,

/s/ Melanie K. Sharp

Melanie K. Sharp

Attachment

cc: Brock Czeschin, Esq.
Peter J. Macdonald, Esq.
M. Frederick Pritzker, Esq

ADVOKATFIRMAN CEDERQUIST

[FIRM'S LETTERHEAD]

Mr. Steven B Fineman Esq.
Lieff, Cabraser, Heimann & Bernstein, LLP
780 Third Avenue, 48 Floor
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USA

Stockholm, September 20, 2004

Dear Mr. Chiplock,

Status report; Swedish arbitration between Plenteous Corp. and Xcelera Inc.

We are able to provide you with the following information In the matter of the Swedish arbitration between Plenteous Corp (below "Plenteous") and Xcelera Inc.; Information that you may communicate to the Delaware Court as offered in your e-mail dated 17th September 2004 to Mr. Gunner Gillberg.

Albeit that we have not until recently been informed that the litigation matter before the Delaware Court may be dismissed, depending on the progress of the Swedish arbitration, we have earlier been instructed by Plenteous to initiate arbitration proceedings as soon as possible.

The current tactics are to prepare the case thoroughly before arbitration proceedings are initiated, meaning that we intend to have the case prepared in full detail, with a final version of Plenteous' statement of claim, before we initiate the proceedings. The reason underlying the said tactics, is that we based on previous experience believe that the arbitration proceedings will be conducted in a speedier manner, to the benefit of our client, if the case is thoroughly prepared before arbitration proceedings are initiated.

Considering (a) the amount of investigations, calculations and evidence that remains to be performed respectively collated, before it would be appropriate to submit a request for arbitration, and thereby to initiate the Swedish arbitration proceedings, and (b) the resources presently available at my law firm, I assume that the Swedish arbitration proceedings will be initiated within four (4) weeks from the date of this letter.

Plenteous has already assigned its arbitrator to the proceedings, but the arbitration panel will not be convened before the arbitration proceedings have been initiated by a formal request for arbitration.

Kind regards

/s/ Olof Nilsson

Olof Nilsson

EXHIBIT C
OF DEFENDANTS' RULE 41 (e) MOTION TO DISMISS FOR FAILURE TO PROSECUTE FEBRUARY 14, 2005

[Letter of Plaintiffs' Counsel to the Delaware Chancery Court dated October 27, 2004]

YOUNG CONAWAY STARGATT & TAYLOR, LLP
[FIRM'S LETTERHEAD]

October 27, 2004

VIA E-FILE

The Honorable Leo E Strine, Jr
Court of Chancery
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

Re: **Parfi Holding AB, et al. v Mirror Image Internet, Inc., et al. Del. Ch. Civil Action No. 18507-NC**

Dear Vice Chancellor Strine:

Pursuant to the Court's prior request for a detailed report concerning the status of arbitration proceedings in Sweden by Plenteous Corporation ("Plenteous"), one of the Plaintiffs in the above-captioned case, we now provide this updated report.

As previously indicated to the Court, the undersigned counsel, as well as Plaintiffs' co-counsel, are not involved in the Swedish arbitration proceedings. On September 23, 2004, Plaintiffs' counsel forwarded to the Court a letter from Plenteous' Swedish counsel indicating that a formal request for arbitration in Sweden would be issued by Plenteous within four weeks of that date, or on or before October 18, 2004.

Plaintiffs' counsel has since been informed by Plenteous that it has been unable to initiate a formal request for arbitration as previously represented. Plaintiffs' counsel is currently gathering the necessary information from Plenteous and its Swedish counsel to explain both the reasons why Plenteous has not initiated the arbitration, as well as Plenteous' next steps. We will submit detailed declarations from both Plenteous and its Swedish counsel regarding the same as soon as possible.

Plenteous' principal will be present in person at the conference now scheduled for 9:30am on Friday, December 10, 2004.

Thank you for your kind attention to this matter.

Respectfully,

/s/ Melanie K. Sharp

Melanie K. Sharp

cc: Register in Chancery
Brock Czeschin, Esq.
Peter J. Macdonald, Esq.
Robert G. Eisler
M. Frederick Pritzker, Esq.

EXHIBIT D
OF DEFENDANTS' RULE 41(e) MOTION TO DISMISS FOR FAILURE TO PROSECUTE FEBRUARY 14, 2005

Council 81, AFCSME v New Castle County
1988 WL 94744 (Del.Ch.).

Michaels v Lesser
275 A.2d 797

Jaeger v Muscat
43 Del.Ch. 178, 221 A.2d 607.

[OMITTED FOR THE PURPOSES OF THE PETITION]

&

[**AFFIDAVIT OF PETER J. MACDONALD** PER THE DEFENDANTS' MOTION TO DISMISS FEBRUARY 14, 2005 **OMITTED** FOR THE PURPOSES OF THE PETITION]

&

[DEFENDANTS' **NOTICE OF MOTION** PER THEIR MOTION TO DISMISS FEBRUARY 14, 2005 **OMITTED** FOR THE PURPOSES OF THE PETITION]

&

[DEFENDANTS' **CERTIFICATES OF SERVICE** PER THEIR MOTION TO DISMISS FEBRUARY 14, 2005 **OMITTED** FOR THE PURPOSES OF THE PETITION]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB, GUNNAR)
GILLBERG, PLENTEOUS CORP.)
and GRANDSEN, LTD.,)
)
Plaintiffs,)
v.) C.A. No.
) 18507-NC
MIRROR IMAGE INTERNET, INC.,)
XCELERA INC., ALEXANDER M.)
VIK, GUSTAV VIK and HANS)
MAGNUS FAJERSON,)
)
Defendants.)

MOTION TO LIFT STAY

Plaintiffs Parfi Holding AB, Gunnar Gillberg, and Plenteous Corp ("Plaintiffs")[1] hereby move the Court to lift the stay in this action imposed by the Court's order dated February 12, 2004. The grounds for this motion are both set forth in the Affidavit of Atle Lygren (attached hereto as Exhibit A) and letter of Olof Nilsson to Steven E. Fineman, dated December 1, 2004 ("Nilsson Letter") (attached hereto as Exhibit B), and are summarized below:

1. On February 12, 2004, the Court ordered that this action be stayed pending completion of a damages arbitration ("Damages Arbitration") in Sweden between Plenteous Corp. ("Plenteous") and Xcelera.com, Inc. ("Xcelera").

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[1] Grandsen, Ltd has ceased its participation in this action pursuant to the Joint Prosecution Agreement amongst the investors who originally filed this action, and will therefore be removed as a Plaintiff in this action if and when the stay in this action is lifted.

2. The Damages Arbitration would be a separate proceeding from that which resulted in a determination of liability in favor of Plenteous and against Xcelera on September 26, 2001 (the "Liability Arbitration") See Affidavit of Atle Lygren at ¶¶6, 13; Nilsson Letter at pp. [268–271].* The Damages Arbitration would not be a mere resumption or continuation of the Liabil-ity Arbitration, but rather a completely new arbitrat-ion, requiring the filing of a new request for arbitrat-ion and the appointment of a new arbitration tribunal. Nilsson Letter at pp. [269–273].

3. The other Plaintiffs, apart from Plenteous, either were not parties to the Liability Arbitration or did not receive a judgment in the Liability Arbitration. Affidavit of Atle Lygren at ¶¶ 4-5. Only Plenteous, therefore, would be a party to the Damages Arbitration against Xcelera.

4. Instituting the Damages Arbitration requires a formal request for arbitration to the relevant Swedish authority, in addition to a requisite advance payment that is determined by the amount of damages claimed in the Damages Arbitration. Affidavit of Atle Lygren at ¶ 13; Nilsson Letter at pp. [277–281].

5. Filing the Damages Arbitration in Sweden will require an advance payment by Plenteous of approximately 395,200 EUROS, or over $515,000. Nilsson Letter at p. 10. This amount does not include the costs of prosecuting the damages arbitration, which could exceed an additional $500,000, if the costs of the Liability Arbitration are any indication. Nilsson Letter at p. [281].

6. Changed financial circumstances of Plenteous have rendered it impossible for Plenteous to pay

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* *Nota Bene*: the page references herein have been amended *mutatis mutandis* for the purposes of this Appendix to this Petition.

the fee that is required to initiate and pursue the Damages Arbitration. Affidavit of Atle Lygren at ¶¶ 24-26.

7. Under the Court's Order of February 12, 2004, Plaintiffs as a whole are estopped from litigating this action until the Damages Arbitration is complete.

8. Setting aside the fact that they would not be parties to the Damages Arbitration, Plaintiffs Parfi Holding AB and Gunnar Gillberg are financially unable to share in the costs to Plenteous of initiating and pursuing the Damages Arbitration to completion, which at present is the only way by which Plaintiffs' claims may continue to be pursued in this action.

WHEREFORE, Plaintiffs respectfully request that the Court enter the attached order lifting the stay previously entered in this action.

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Counsel for Plaintiffs

Dated: February 18, 2005

[PLAINTIFF'S ACCOMPANYING CERTIFICATE OF SERVICE OMITTED FOR THE PURPOSES OF THE PETITION]

EXHIBIT A
OF PLAINTIFFS' MOTION TO LIFT STAY
FEBRUARY 18, 2005

[Affidavit of Atle Lygren December 1, 2004
("**2004 Affidavit**" for the purposes of the Petition)]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD., Plaintiffs, v. MIRROR IMAGE INTERNET, INC., XCELERA INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON, Defendants.	C.A. No. 18507-NC

AFFIDAVIT OF ATLE LYGREN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ATLE LYGREN, being duly sworn, deposes and says that:

1. I am the authorized representative of Plenteous Corporation ("Plenteous"), one of the plaintiffs in this action.

2. I submit this Affidavit to update the Court on the status of arbitration proceedings in Sweden involving Plenteous and Xcelera.com, Inc. ("Xcelera"), one of the defendants in this action. For the reasons set forth herein, based on a detailed effort at

determining damages and a close examination of Swedish arbitration procedures, Plenteous cannot at this time afford to initiate new arbitration proceedings against Xcelera, and requests that the stay in this action be lifted.

3. The above-captioned action was filed by Plaintiffs Path Holding AB ("Parfi") Gunnar Gillberg, Plenteous, and Grandsen, Ltd. ("Plaintiffs") on November 16, 2000, seeking damages from Defendants Xcelera.com, Inc., Alexander M. Vik, Gustav Vik and Hans Magnus Fajerson for the alleged scheme to dilute Plaintiffs' ownership interest in Defendant Mirror Image Internet, Inc. ("Mirror Image"), as well as for misappropriation of a corporate opportunity whereby Defendants were allegedly personally enriched at the expense of Mirror Image through a series of transactions. From the outset of this litigation, Plaintiffs have been represented by Brown Rudnick Berlack Israels, LLP ("Brown Rudnick").

4. In separate proceedings before the Swedish Arbitration Tribunal, initiated on May 15, 2000, Plenteous and Drax Holding, AB ("Drax")[1] sought a determination of liability (the "Liability Arbitration") as to Xcelera for its alleged breach of, and fraudulent inducement of, an underwriting agreement (the "Underwriting Agreement") the parties had entered into that was designed to fund the operations of Mirror Image between March 1999 and July 1999. The Liability Arbitration was commenced before Brown Rudnick had been retained to represent Plaintiffs in this action.

5. Plenteous won a determination of liability against Xcelera before the Swedish Arbitration Tribunal on September 26, 2001. The Tribunal held that Xce-

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[1] Drax was the successor entity to Mirror Image Internet AB, which was founded by Mr. Sverker Lindbo

lera made false representations that it would not take unilateral steps to dilute Plenteous's shares in Mirror Image Internet, Inc. and that Plenteous relied on these assumptions when it entered into the Underwriting Agreement. The Tribunal held that the Underwriting Agreement was invalid due to those false representtations and ordered Xcelera to "compensate Plenteous Corporation for the damages suffered because of the decisions on April 23, 1999 and July 10, 1999 to issue shares in Mirror Image Internet, Inc....". The Tribunal ruled against Drax, finding that Xcelera had not breached its contractual obligation to Drax. The Tribunal did not adjudicate any of the Plaintiffs' dilution of value claims arising outside of the Underwriting Agreement, nor any of Plaintiffs' derivative claims on behalf of Mirror Image alleging misappropriation of a corporate opportunity by Defendants.

6. The Liability Arbitration did not result in an award of damages to Plenteous, but was restricted solely to a determination of liability on the part of Xcelera to Plenteous in connection with the Underwriting Agreement. Under Swedish law, the losing parties in the arbitration were required to pay the costs of the prevailing parties. Xcelera thus had to pay SEK 3,926,256 (or approximately US $583,384) to Plenteous to cover its litigation costs, but Drax had, in turn, to pay Xcelera US $407,374 plus SEK 25,440 (or approximately $3,778) in legal costs.

7. On September 12, 2003, Plenteous' Swedish counsel, Mr. Olof Nilsson, sent a letter (the "Demand Letter") to counsel for Xcelera demanding payment of US $569,323,755.00 in damages to satisfy the judgment rendered in the Liability Arbitration. Under Swedish law, interest on a damages award does not begin to accrue until such a demand is made. It was for this reason that the Demand Letter was sent. The De-

mand Letter was not sent to anyone other than counsel for Xcelera; it was not sent to any Swedish Arbitration Tribunal, as the previous one ceased to exist after the Liability Arbitration was over

8. On September 25, 2003, after the Demand Letter was sent, Plaintiffs retained Lieff Cabraser, Heimann & Bernstein, LLP ("Lieff Cabraser") as additional counsel in this action.

9. On October 1, 2003, counsel for Xcelera responded to the Demand Letter with a refusal to accede to Plenteous's demand for damages, and filed a motion in this action to permanently enjoin Plenteous from instituting arbitration proceedings to recover damages stemming from the Liability Arbitration.

10. At Plaintiffs' direction, Lieff Cabraser prepared and filed an opposition to Defendants' motion to permanently enjoin arbitration, in which Plaintiffs asserted that Plenteous would agree not to seek damages through arbitration with respect to the specific findings in the liability Arbitration concerning the Underwriting Agreement until this action was completely resolved. Plaintiffs also offered to stipulate to the same with Xcelera prior to filing their opposition, but were refused.

11. On February 12, 2004, this Court denied Xcelera's motion, and stayed this action pending the completion of arbitration proceedings in Sweden to determine the amount of damages to be awarded to Plenteous as a result of the Tribunal's decision in the Liability Arbitration.

12. Although Plaintiffs believed that they should be able to continue these proceedings in Delaware, in March 2004, Plenteous instructed its Swedish counsel, Mr. Olaf Nilsson, to begin preparations for arbitration proceedings to affix the damages owed to Plenteous (the "Damages Arbitration).

13. As explained in detail in the accompanying letter to Steven H. Fineman by Olof Nilsson, the Damages Arbitration would not be a mere resumption or continuation of the Liability Arbitration. Instituting the Damages Arbitration requires a formal request for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce, followed by a requisite advance payment of between EURO 241,500 and 843,750 or US $321,811 and $1,124,339. The requisite advance payment is determined by the amount of damages claimed in the Damages Arbitration. This amount does not include the costs of prosecuting the arbitration, which if the Liability Arbitration is any guide, may be approximately US $600,000, as well as the costs of experts.

14. As part of the preparation for the Damages Arbitration, Mr. Nilsson was instructed to prepare advice on the type of evidence to be collected and presented to support Plenteous' damages claim against Xcelera, as well as possible alternative methods by which to calculate Plenteous' claim for damages under Swedish law.

15. During the months of April and May, 2004, Mr. Nilsson's law firm prepared a memorandum detailing the necessary evidence to be gathered in support of the Damages Arbitration, and Plenteous secured the availability of one of the arbitrators who had served on the previous panel in the Liability Arbitration.

16. From June through September of 2004, Mr. Nilsson's law firm continued to investigate and report to me, Gunnar Gillberg, and Sverker Lindbo[2] concerning an action plan for proceeding with the Damages Arbitration.

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[2] Sverker Lindbo is the authorized representative of Parf Holding AB ("Parfi")

17. During this time frame, as part of this investigation, I, along with Messrs. Gillberg and Lindbo, searched for documents that could verify Plenteous' damages claim against Xcelera. The only source of information for us to verify the damage calculations has been the Internet, including the disclosures of Xcelera, Exodus Communications, Inc. ("Exodus"), and Mirror Image (which is not a public company).

18. We have also worked on preparing a list of events in chronological order matching it with Xcelera's share price movement, Here we have had to identify actual events and separate them from perceived events. We worked to match publicly announced information by Xcelera and Mirror Image with share price development. We also worked to verify the actual dilution that took place each time and what was communicated to the market to determine the basis on which the market valued Xcelera stock. We also worked to determine the percentage of shares the market perceived that Xcelera owned in Mirror Image as a basis for valuating Xcelera, and in turn Mirror Image.

19. We further had to calculate different damage scenarios, e.g. what the damage would be if Plenteous had invested its prorated share in Mirror Image, and in the alternative what it would be if Plenteous had been diluted at fair market value.

20. We further had to calculate the impact of the December 1999 transaction between Xcelera and Hewlett-Packard ('HP') described in Plaintiffs' First Amended Complaint at ¶¶ 76-84, on the valuation of Mirror Image. Although Xcelera did the deal with HP at one valuation, it applied a different valuation on the capital increase in Mirror Image We undertook all of these analyses with the understanding that there was no specific time flame within which Plenteous had to

initiate the Damages Arbitration, though we endeavored to move as quickly and efficiently as possible.

21. In the month of August 2004, personal crises involving close family members of two of the key personnel evaluating Plenteous' damages claim slowed down the process of initiating the Damages Arbitration.

22. On September 16, 2004, I was advised that the Court required a detailed update on the status of initiating the Damages Arbitration, and that the Court expected the Damages Arbitration would be filed shortly, or else this action would be dismissed.

23. On September 20, 2004, at my direction, Mr. Nilsson stated, in a letter addressed to Lieff Cabraser, that Plenteous had undertaken preparations for initiating the Damages Arbitration, and that the proceedings would be initiated within 4 weeks, or on or before October 18, 2004.

24. Prior to this date, at the end of August 2004, a company in which Plenteous is invested, and which is the sole source of liquidity for Plenteous, announced a private placement with a leading United States hedge fund. Though this on its face appeared to be good news, the hedge fund immediately turned around and supported a short selling strategy against the company's stock, with the result that in the ensuing period the stock has fallen by more than 50%, from an almost all-time high to a 52-week low. The consequence has been that Plenteous no longer has the funds to initiate the Damages Arbitration (and pay the requisite advance fees) at this time. This fact was not known to Plenteous when Mr. Nilsson sent his September 20, 2004 letter, nor to Plaintiffs' counsel in this action. Nor had Messrs. Lindbo, Gillberg and myself calculated, at that time, the exact advance fees to be charged by the Swedish Arbitration Tribunal.

25. Furthermore, Xcelera was de-listed from the American Stock Exchange prior to trading on November 15, 2004, last traded at 36 cents per share, and based on Plenteous' best knowledge, due to its having been tapped for hundreds of millions of dollars, would not be able to satisfy a judgment in Plenteous' favor stemming from the Damages Arbitration.

26. For the foregoing reasons, Plenteous has not initiated the Damages Arbitration, nor can it afford to in the foreseeable future Plenteous does not have the resources to raise the funds required to initiate the Damages Arbitration, which would necessarily only involve Plenteous and Xcelera as parties. Plenteous therefore requests that the stay in this action be lifted so that Plaintiffs may seek compensation from all of the Defendants in this action.

/s/ Atle Lygren

ATLE LYGREN

Sworn to before me this
1st day of December, 2004.

/s/ Loris McDonald

Loris McDonald
Notary Public, State of New York
No. 01MC6031919
Qualified in New York County
Commission Expires October 12, 2005

EXHIBIT B
OF PLAINTIFFS' MOTION TO LIFT STAY
FEBRUARY 18, 2005

[Letter of Olof Nilsson of Swedish Law Firm
"Cederquist" dated December 1, 2004
("**Nilsson Affidavit**" for the purposes of the Petition)]

ADVOKATFIRMAN CEDERQUIST
[FIRM'S LETTERHEAD]

Mr. Steven B Fineman Esq.
Lieff, Cabraser, Heimann & Bernstein, LLP
780 Third Avenue, 48 Floor
New York, New York 100 17-2024
USA

Stockholm, December 1, 2004

Dear Mr. Steven B Fineman,

Re: **Parfi Holding AB, et al. v. Mirror Image Internet, Inc et al.; No. 18507NC (Delaware Chancery Court)**

Pursuant to your letter dated 21 October 2004, and your therein stated request in regard to the litigation matter mentioned above, please find below my affidavit in regard to certain issues.

The only Swedish arbitration proceedings that have ever been initiated between Plenteous Corp. and Xcelera Inc. in Sweden, is in the matter of arbitration (045/2000) between the aforesaid parties under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (below the "Arbitration"). In the Arbitration, Plenteous Corp. did not claim compensation for any of the losses and damages that has actually been incurred as a consequence of the defendant's behaviour. Plenteous Corp. only claimed that the arbitral tribunal should rule that the underwriting agreement between the parties is invalid, and that Xcelera Inc. has incurred liability as a consequence of the behaviour which was invoked by Plenteous Corp. The latter claim was a claim for a declaratory judgment regarding the liability, and thus not a claim for performance by Xcelera Inc. of any quantified amount of compensation.

The Arbitration was limited to liability only for two reasons:

(i) the Arbitration was instigated in the first place pursuant to advise by Plenteous' US counsel to get a favourable ruling to support the US litigation, i.e. a ruling of substance that the underwriting agreement and the arbitration clause contained therein is invalid, because a ruling would avoid some otherwise possible procedural obstacles to the US litigation; and

(ii) a quantified claim for compensation would be made in the US.

The Arbitration resulted in an arbitral award issued by the arbitral tribunal on 26 September 2001 (below the "Award"), in which the arbitrators ruled in favour of Plenteous Corp. and awarded its claims. The arbitral tribunal of the Arbitration was dissolved after it had made its Award, and the arbitral tribunal does no longer exist as a consequence thereof. Neither party has filed a request for any new arbitration after the Award, nor has any new arbitral tribunal been constituted.

The Award is not enforceable in the sense that Plenteous Corp. based on the Award may recover a specific amount of compensation for the actually incurred losses and damages. In order for Plenteous Corp. to recover such compensation, it is required

(i) that Xcelera Inc. on a voluntary basis makes payment of the specified amount that Plenteous Corp. contends to be equivalent to the losses and damages that was actually incurred; as a consequence of the behaviour for which Xcelera Inc. incurred liability according to the Award,

or, if Xcelera Inc. refuses to make such payment voluntarily,

(ii) that Plenteous subsequently initiates new arbitration proceedings and in connection therewith obtains an award of substance that Xcelera Inc. is obliged to pay a specified amount of compensation for the losses and damages that has been incurred by Plenteous Corp.

In a letter dated 12 September 2003, Plenteous Corp. has requested that Xcelera Inc. shall make voluntary payment of US$ 569,323,755, an amount that according to Plenteous Corp. is equal to the losses and damages that Plenteous Corp. has suffered. This letter was addressed to legal counsel acting on behalf of Xcelera Inc., and was never sent to any of the previously appointed arbitrators in the Arbitration nor to the SCC Institute (as defined below).

In a letter dated 1 October 2003, from Xcelera Inc. to myself and to two of my colleagues only, Xcelera Inc. made it very clear that it would not voluntarily make payment of the amount that was claimed by Plenteous Corp. in its letter, and that Xcelera Inc. would contest the claim vigorously and aggressively if Plenteous Corp. should "choose to pursue [its] claim further".

Pursuant to the said refusal by Xcelera Inc. to make voluntary payment of the claimed amount, the only Swedish option remaining for Plenteous Corp. has been, and still remains, to initiate new arbitration proceedings and to therein claim that the subsequently appointed arbitrators shall rule that Xcelera Inc. is obliged to pay US$ 569,323,755 or a reasonable lower amount to Plenteous Corp (below the "Damages Arbitration").

It is not legally possible under Swedish laws and the applicable Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (below the "SCC Rules') to initiate the Damages Arbitration by having the former Arbitration (Lc. the first and only arbitration between the parties) resumed or continued. The Damages Arbitration would therefore constitute a completely new arbitration, and not a continuation or resumption of the Arbitration. The dissolved arbitral panel of the former Arbitration has no remaining mandate to rule in the matters that would be covered by the Damages Arbitration, nor to rule in any other mailer between the par ties; the said arbitrators do not even have any right to provide an interpretation of its previcusly made Award (see article 37 of the SCC Rules, as defined below).

The only possible way for Plenteous Corp. to initiate the Damages Arbitration is to file a formal request for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (below the "SCC Institute"), i.e. to initiate new arbitration proceedings in regard to the outstanding legal matters, Plenteous would in such a request for arbitration be obliged to comply with article 5 of the SCC Rules:

> **Article 5 Request for Arbitration**
>
> Arbitration is initiated by the Claimant filing with the SCC Institute a Request for Arbitration which shall include:
>
> (i) a statement of the names, addresses, telephone and facsimile numbers and e-mail addresses of the parties and their counsel;

(ii) a summary of the dispute;

(iii) a preliminary statement of the relief sought by the Claimant;

(iv) a copy of the arbitration agreement or clause under which the dispute is to be settled; and

(v) if applicable, a statement identifying the arbitrator appointed by the Claimant, including such arbitrator's address, telephone and facsimile numbers and e-mail address.

No such request for arbitration has ever been filed by Plenteous Corp concerning its claim for compensation for the incurred losses and damages. After receipt of such a request for arbitration, the SCC Institute shall send the request for arbitration to the defendant, i.e. Xcelera Inc., and the defendant shall thereafter comply with article 10 of the SCC Rules.

Article 10 The Respondent's Reply

(1) The Request for Arbitration shall be communicated by the SCC Institute to the Respondent. The Respondent shall be asked to submit a Reply to the SCC Institute, The Reply shall be submitted within the period of time determined by the SCC Institute and shall include:

(i) comments regarding the Request for Arbitration by the Claimant; and (ii) if applicable, a statement identifying the arbitrator appointed by the Respondent, including such arbitrator's address, telephone and facsimile numbers and e-mail address.

(2) If the Respondent wishes to raise any objection concerning the validity or applicability of the arbitration agreement, such objection shall be made in the Reply together with the grounds therefore.

(3) If the Respondent wishes to file a counterclaim or a set-off claim, a statement to that effect should be made in the Reply and should include the nature of the claim and a preliminary statement of the relief sought. The grounds for any counterclaim or set-off claim must be based on the arbitration agreement.

(4) The SCC Institute shall communicate the Respondent's Reply to the Claimant. The Claimant shall be given an opportunity to comment on any objections and pleas advanced by the Respondent.

(5) Failure by the Respondent to submit a Reply shall not prevent the arbitration from proceeding pursuant to these Rules.

The SCC Institute will not refer the case to any arbitral tribunal before the arbitrators have been appointed, nor before the parties/claimant/defendant has made advance payment of the estimated arbitration costs (see article 15 of the SCC Rules).

The number of arbitrators to be chosen and how they shall be appointed is governed by article 13 and article 16 of the SCC Rules:

Article 13 Appointment of Arbitrators and Place of Arbitration

When the exchange of written submissions pursuant to Articles 5 - 11 has been concluded, the SCC Institute shall

(i) decide the number of arbitrators, if not agreed by the parties;

(ii) when so required pursuant to Article 16, appoint a sole arbitrator or chairman of the Arbitral Tribunal and, if necessary, a co-arbitrator;

(iii) decide the Place of Arbitration, if not agreed upon by the parties; and

(iv) fix the Advance on Costs pursuant to Article 14.

Article 16 Number of Arbitrators and Manner of their Appointment

(1) The parties are free to determine the number of arbitrators. Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the SCC Institute, taking into account, inter alia, the complexity of the case, the amount in dispute and other circumstances, decides that the dispute is to be settled by a sole arbitrator.

(2) Where the Arbitral Tribunal shall consist of more than one arbitrator, each party shall appoint an equal number of arbitrators. Where a party fails to appoint an arbitrator within the period of time stipulated by the SCC Institute, the SCC institute shall make the app-

ointment, unless otherwise agreed by the parties.

(3) Where there are multiple parties on either side and the dispute is to be decided by more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment the SCC institute shall make the appointment for that side. If the circumstances so warrant the SCC Institute may appoint the entire Arbitral Tribunal, unless otherwise agreed by the parties.

(4) Where the Arbitral Tribunal is to consist of more than one arbitrator, the Chairman shall be appointed by the SCC Institute, unless otherwise agreed by the parties.

(5) Where the dispute is to be decided by a sole arbitrator, the SCC Institute shall make the appointment, unless otherwise agreed by the parties.

(6) Where an arbitrator appointed by a party dies, the party in question shall appoint another arbitrator Where an arbitrator appointed by the SCC Institute dies, the SCC Institute shall appoint another arbitrator.

(7) Where an arbitrator resigns or is removed, the SCC Institute shall appoint another arbitrator. If the arbitrator had been appointed by a party, the SCC Institute shall solicit the views of the

> appointing party. Where the Arbitral Tribunal consists of three or more arbitrators, the SCC Institute may decide that the remaining arbitrators shall proceed with the case. Prior to making such a decision, the views of the parties and the arbitrators shall be solicited.
>
> (8) If the parties are of different nationalities the SCC Institute shall appoint a sole arbitrator or a Chairman of a nationality other than of the parties, unless the parties have agreed differently or if otherwise deemed appropriate by the SCC Institute.

Plenteous Corp. will pursuant to the rules of the said articles have the option to choose one out of three arbitrators if the Damages Arbitration is subsequently initiated. There is nothing to prevent Plenteous Corp. from choosing one of the arbitrators from the former Arbitration, but Plenteous Corp. will not be obliged to make such a choice. Both Xcelera Inc and the SCC Institute have a similar freedom to choose an arbitrator, and it should therefore be obvious that the arbitral tribunal of the hypothetical Damages Arbitration may be constituted by different arbitrators than the arbitral tribunal of the former Arbitration. None of the chosen arbitrators will be obliged to accept the appointment made by the claimant/defendant/SCC Institute.

The amount of the advance payment to be made by the parties/claimant/defendant shall be decided on basis of, and paid in accordance with, article 14, article 39 and the rules set out in section III (appendix, regulations for arbitration costs) of the SCC Rules:

Article 14 Advance on Costs

(1) The Advance on Costs shall be equivalent to the estimated amount of the Arbitration Costs pursuant to Article 39.

(2) Each party shall contribute half of the Advance on Costs. The SCC Institute may fix separate amounts for counterclaims and set-off claims. After notification by the Arbitral Tribunal, the SCC Institute may, in the course of the proceedings, decide that additional amounts are to be paid.

(3) If a party fails to make a required payment, the SCC Institute shall afford the other party an opportunity to do so within a specified period of time. If the required payment is not made, the case shall be dismissed either wholly or partly to such extent as is attributable to the missing payment

(4) The SCC Institute may during or after the proceedings draw on the Advance on Costs to cover the fees of the arbitrator(s) and other arbitration costs.

(5) The SCC Institute may decide that the Advance on Costs may partly consist of a bank guarantee or other form of security.

Article 39 Arbitration Costs

(1) The Arbitration Costs consist of

(i) the arbitrator's fee;

(ii) the Administrative Fee of the SCC Institute;

(iii) compensation due to the arbitrator and the SCC Institute to cover their expenses during the proceedings; and

(iv) the fees and expenses of any expert appointed by the Arbitral Tribunal pursuant to Article 27.

(2) Amounts referred to in sections (i) through (iii) above shall be finally fixed by the SCC Institute in accordance with the Regulations for Arbitration Costs in force at the time of the commencement of the arbitration. The amounts in section (iv) shall be finally fixed by the Arbitral Tribunal.

III APPENDIX

REGULATIONS FOR ARBITRATION COSTS

I. Registration Fee

The Registration Fee in Article 6 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce is EUR 1 500. The registration fee is non refundable and shall constitute a part of the Administrative Fee due to the SCC Institute under Section III Article 2 below and shall be deducted from the Advance on Costs to be paid by the Claimant pursuant to Article 14 of the SCC Rules.

II. Advance on Costs

According to Article 13 of the SCC Rules, the SCC Institute shall fix an amount which, together with the accrued interest, shall constitute an advance on the Arbitration.

Costs. The amount shall cover the estimated Arbitration Costs pursuant to Article 39 of the Rules and, if required, value added tax, Amounts referred to in the first paragraph, sections (1) through (iii), in Article 39 of the Rules are to be determined pursuant to these Regulations.

III Arbitration Costs

Article I Arbitrator's Fee

(1) Unless otherwise agreed by the parties, the SCC Institute shall decide the fees of the arbitrator in accordance with the table below, based on the amount in dispute. If so required by law, value added tax shall be added to such fees.

(2) For the purpose of calculating the amount in dispute, the value of any counter claim or set-off claim is to be added to the amount of the claim with the exception of interest claims. Where the amount in dispute is not specified, the SCC Institute will fix the fees on the basis of an assessment of the size of the case. Each party must provide the SCC Institute with the information deemed necessary for such assessment.

(3) If a case has required substantially more or less work than is considered normal, the SCC Institute may deviate from the amounts stated in the table.

(4) The fee due to the co-arbitrator is fixed per person to 60 per cent of the total fee paid to the Chairman, unless the

SCC Institute decides otherwise in view of any special circumstances of the case.

Article 2 Administrative Fee of the SCC Institute

(1) The SCC Institute shall decide the Administrative Fee due to it. The decision is based on the amount in dispute in accordance with the table below, If so required by law, value added tax shall be added to the Administrative Fee.

(2) For the purpose of calculating the amount in dispute, the value of any counterclaim or set-off claim is to be added to the amount of the claim, with the exemption of interest claims. Where the amount in dispute is not specified, the SCC Institute will fix the Administrative Fee on the basis of an assessment of the size of the case. Each party must provide the SCC Institute with the information deemed necessary for such assessment.

(3) If a case has required substantially more or less work than is considered normal, the SCC Institute may deviate from the amounts stated in the table.

Article 3 Expenses

In addition to the fee(s) of the arbitrator(s) and the Administrative Fee of the SCC Institute, the SCC Institute shall fix an amount, to be provided by the parties, to cover reasonable expenses for the arbitrator(s) and to the SCC Institute.

[ARBITRATOR'S FEE : TABLE OMITTED FOR THE PURPOSES OF THE PETITION]

Pursuant to the aforesaid rules the amount of the advance costs for the hypothetical Damages Arbitration should be between approximately EURO 241,500 and EURO 843,750 plus expenses pursuant to article 39(1)(iii) and (iv). This amount will be fixed by the SCC Institute if the Damages Arbitration is later initiated.

An amount corresponding to such an estimate of the arbitration costs will have to be paid in advance by the parties to the SCC Institute (see article 14 (2) of the SCC Rules), and by Plenteous Corp. alone if Xce-lera Inc should fail to contribute its half of such an amount (see article 14 (2) and (3) of the SCC Rules). Unless this advance payment is made within the time frame set forth by the SCC Institute, the SCC Institute will not refer the case to the appointed arbitrators but rather dismiss the case to the extent payment is not made.

In addition to the amount mentioned above, which is an estimate, Plenteous Corp. will have to pay a registration fee of EURO 1,500, and for the legal counsel (approximately between USS 495 and US$ 310 per hour) appointed to present its cases. The hypothetical Damages Arbitration would require lots of work by the appointed legal counsel, but it is difficult to estimate a fixed amount. The former Arbitration rendered costs for legal representation in the amount of approximately US$ 600,000 for Plenteous and approximately US$ 1,120,000 for Xcelera Inc.

The final apportionment of the arbitration costs as between the parties, and the allocation of the parties' costs for presenting theft case, is decided by article 40 and article 41 of the SCC Rules respectively.

> **Article 40 Payment of Arbitration Costs**
>
> (1) The parties are jointly and severally liable for all payments of all costs mentioned in Article 39.

> (2) The Arbitral Tribunal decides on the apportionment of the arbitration costs as between the parties with regard to the outcome of the case and other circumstances.
>
> **Article 41 Costs Incurred by a Party**
> Unless the parties have agreed otherwise, the Arbitral Tribunal may, at the request of a party, in an Award or other order by which the arbitral proceedings are terminated order the losing party to compensate the other party for legal representation and other expenses for presenting its case.

Plenteous Corp. initiated preparations for the Damages Arbitration during the spring of year 2004. My law firm was involved in these preparations and therewith acted in accordance with the instructions given to us by Mr. Atle Lygren and Mr. Gunnar Gillberg.

We were more exactly instructed to give advice on the type of evidence that needed to be collated in order to pursue the Damages Arbitration successfully, and wrote a memorandum dated April 2004 in which such was advice was given to the said gentlemen. In the said memorandum we also gave advice on possible alternative manners to calculate the claim for damages under Swedish laws, and the various steps involved in such alternative methods, and the evidence needed if such methods would be used.

In the end of May 2004 we also discussed with one of the former arbitrators, Mr. Dag Wersén, i.e. one of the arbitrators of the now dissolved arbitration panel that made the Award, whether or not he would be available and willing to accept a fixture appointment as arbitrator if the Damages Arbitration would be initiated. He said that he would accept such an appointment.

We have during June 2004 and during the fall 2004 also compiled with instructions to give advice on the Swedish arbitration procedure, and to outline an action plan for pursuing the Swedish Damages Arbitration, and we have furthermore complied with instructions to give advice on the investigations that remain to be completed.

On 3 June 2004 we more specifically sent a memorandum to Mr. Steven E. Fineman, in which memorandum we clarified a number of procedural issues pertaining to the potential Damages Arbitration. On 17 September 2004 we proposed an action plan to Mr. Atle Lygren, Mr. Gunnar Gillberg and Mr. Sverker Lindbo regarding the potential Damages Arbitration; in which proposal we also requested some additional information and evidence that we deemed necessary in order to adequately present Plenteous' case in the potential Damages Arbitration.

Upon receipt from the said gentlemen on 13 October 2004 of additional information and evidence, we immediately started drafting a request for arbitration and a more developed statement of claim. However, none of these drafts were finalised or submitted to the SCC Institute, because Plenteous informed me during the drafting procedure that it is presently unable to finance the arbitration costs involved in the potential Damages Arbitration.

In order to resolve some of the financial issues, we have been involved in negotiations with the SCC Institute. We have therewith attempted to convince the SCC Institute to provide a preliminary statement regarding the estimated amount of the advance payment, and to provide a statement of substance that the amount subsequently fixed by the SCC Institute will be below the minimum amount under the SCC Rules, or as close to the minimum amount as possible. The SCC Institute has informed us that their appreciation that the advance costs might be set in the future at approximately EURO 395,200 see **Enc. 1**.

Plenteous Corp. has informed me that it is not able to finance the amount of EURO 395,200 having regard to the current financial situation of Plenteous Corp., and Plenteous Corp. has furthermore informed me that this inability holds true even if Xcelera Inc. would contribute 50 % of the said amount. I have been told that the reason underlying Plenteous Corp inability is that Plenteous Corp.'s only liquid asset is constituted by shares in one publicly listed company, that the stock value of the said company has recently dropped substantially due to a shortselling attack and that the decreased value has made it impossible for Plenteous Corp. to finance the hypothetical Damages Arbitration. When I drafted my status report of 20 September 2004, I had been given the information the Plenteous Corp. intended to initiate the Damages Arbitration as soon as the preparations had been completed. The said status report was prepared in good faith, and I was optimistic at the time that the preparations were going to be completed by mid-October 2004.

Kind regards,

/s/ Olof Nilsson
Olof Nilsson

[PLAINTIFF'S **DRAFT ORDER** PER PLAINTIFFS' MOTION
TO LIFT STAY FEBRUARY 18, 2005
OMITTED FOR THE PURPOSES OF THE PETITION]

&

[PLAINTIFF'S **NOTICE OF MOTION** PER PLAINTIFFS'
MOTION TO LIFT STAY FEBRUARY 18, 2005
OMITTED FOR THE PURPOSES OF THE PETITION]

&

[PLAINTIFF'S **CERTIFICATE OF SERVICE** PER
PLAINTIFFS' MOTION TO LIFT STAY FEBRUARY 18, 2005
OMITTED FOR THE PURPOSES OF THE PETITION]

[INTENTIONALLY BLANK]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PARFI HOLDING AB, GUNNAR GILLBERG, PLENTEOUS CORP. and GRANDSEN, LTD.,

Plaintiffs,

v.

MIRROR IMAGE INTERNET, INC., XCELERA INC., ALEXANDER M. VIK, GUSTAV VIK and HANS MAGNUS FAJERSON,

Defendants.

C.A. No. 18507-NC

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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February 24, 2005

I. PRELIMINARY STATEMENT

Defendants' motion to dismiss this action should be denied. This action has been stayed, pursuant to order of this Court, since February 12, 2004. That stay has not been lifted. A previous status conference in this case, scheduled for December 10, 2004, was postponed at the Court's request. That status conference was rescheduled for March 3,2005, based on the joint availability of the Court, Defendants, and Plenteous Corp. ("Plenteous"). Defendants have not cited, nor have Plaintiffs found, any case in which a court dismissed a case under Court of Chancery Rule 41(e) when that case was subject to a court-ordered stay. Defendants' motion should be denied.

The Court stayed this action pending completion of a damages-phase arbitration in Sweden between Plenteous and one of the Defendants here, Xcelera.com, Inc. ("Xcelera") (the "Swedish Arbitration"). The other named parties to this lawsuit are not direct participants in the Swedish Arbitration. On February 18, 2005, Plaintiffs filed a motion to lift the stay in this action, attaching an affidavit from the representative for Plenteous, Atle Lygren (the "Lygren Affidavit") and a letter from Plenteous' Swedish counsel, Olof Nilsson, dated December 1, 2004 ("Nilsson Letter"). These documents describe the activities by Plenteous to prepare for the Swedish Arbitration. These submissions also explain that Plenteous has not formally initiated the Swedish Arbitration because it is financially incapable of funding the Arbitration.

II. PROCEDURAL HISTORY

On February 12, 2004, this Court stayed this action pending the completion of a damages arbitration proceeding in Sweden between Plenteous and Xcelera.

See Opinion, dated Feb. 12, 2004 ("Order") at 32-33. As Plenteous was the only party to have obtained a favorable liability determination in a previous liability arbitration proceedings in Sweden, it is the only party to have any stake in any future arbitration concerning damages. Defendants' contention that "in reality, the Swedish Arbitration is a coordinated effort among all four plaintiffs" has no basis in the record before this Court and is simply false. See Defs. Mem. of Law I.S.O. Their Rule 41(e) Motion to Dismiss for Failure to Prosecute ("Def Mem") at 1, n. 1.

Defendants state, as if it were fact, that this case is "duplicative" of an "arbitration in Sweden against defendant Xcelera, Inc. based on the same underlying facts and theories of damages." Def Mem. at 1. However, the Delaware Supreme Court found the opposite, as this Court acknowledged in its February 12, 2004 Order. See Order at 2-3.

After the Court's February 12, 2004 Order, Plenteous, which represented Mr. Lygren and its Swedish counsel Mr. Nilsson, commenced a process of preparing for the Swedish Arbitration, including preparing the factual bases for the Arbitration and conducting a damages analysis to be presented to the arbitrators. These efforts are described in detail in the Lygren Affidavit and the Nilsson Letter, attached to Plaintiffs' motion to lift the stay of this action.

On October 27, 2004, Plaintiffs' counsel, which does not represent Plenteous in connection with the Swedish Arbitration, advised the Court that Plenteous had not instituted the Swedish Arbitration, and that further details concerning that fact would be submitted to the Court as soon as Plaintiffs' counsel could ascertain the facts. Letter from plaintiffs' counsel to Vice Chancellor Strine, dated October 27, 2004 (attached hereto as Exhibit "A"). A status conference to discuss the status of the Swedish Arbitration that had been set for December 10, 2004 was then postponed at the Court's request. That status conference was rescheduled for March 3,2005, based on the availability of the Court, Defendants, and Plenteous.

On February 14, 2005, Defendants filed the instant motion to dismiss under Court of Chancery Rule 41(e) on the grounds that Plaintiffs had remained unjustifiably inactive in this stayed action for more than one year. Promptly after the filing of Defendants' motion, counsel for Plaintiffs advised counsel for Defendants that Plaintiffs had been preparing, and intended to file promptly, a motion to lift the stay (along with the Lygren Affidavit and Nilsson Letter). Plaintiffs' counsel inquired whether in light of their anticipated motion to lift the stay Defendants were inclined to proceed with their motion to dismiss. Defendants' counsel indicated that Defendants would proceed with their motion to dismiss. On February 18, 2005, Plaintiffs filed their motion to lift the stay in this action.

III. ARGUMENT

A. Dismissal Of This Action Would Be Inapproriate In Light Of The Court-Ordered Stay Of The Case.

Defendants' motion to dismiss under Court of Chancery Rule 41(e) is unfounded. Rule 41(e) provides that "in each cause pending wherein no action has been taken for a period of 1 year, the Court may ... enter an order dismissing such cause unless good reason for the inaction is given ...". Here, the "good reason for the inaction" is this Court's Order staying the case until the Swedish Arbitration is completed.

Defendants have not cited, and Plaintiffs have not found, a single case where a court dismissed a case, with prejudice, under Rule 41(e) when the reason for inaction was that the case was stayed by order of the court, See Michaels v. Lesser 275 A.2d 797 (Del Ch. 1971) (case dismissed where no action took place for two years and no stay was in place); Jaeger v. Muscat 221 A2d 607 (Del. C 1966) (same); Council 81, AFSCME v. New Castle County 1988 WL 94744 (Del. Ch.) (case dismissed where no action took place for over one year and no stay was in place).

A stay is a routine method by which a plaintiffs rights may be preserved without threat of a Rule 41(e) dismissal. Wilmington Trust Co. v. Barry 397 A2d 135 (Del. Super. 1979) (dismissing a case where "Plaintiff, who might reasonably have sought to reserve his rights by requesting a stay at the time he embarked on his equitable foray, instead refrained" from doing so until after defendant's motion to dismiss); Lane v. Cancer Treatment Centers of America, Inc. 1999 WL 1204848, 2 (Del Ch.) (dismissing case where plaintiff "could have filed a motion to stay the Delaware action or request an extension of time to act based upon special circumstances in order to prevent manifest injustice"), vacated by 2000 WL 364208 (Del. Ch.) (reinstating case).

The stay enforced in this action was ordered by this Court in response to Defendants' efforts to enjoin the proceedings in Sweden between Plenteous and Xcelera while this action was proceeding. Neither Plaintiffs, including Plenteous, nor Defendants requested that stay. Rather than dismiss this action for Plaintiffs' inactivity during the period the case has been stayed, Plaintiffs request (in their separately filed motion) that the Court lift the stay and permit this action to proceed.

B. Plenteous Acted In Accordance With The Court's February 12, 2004 Order In Preparing For The Swedish Arbitration, But Is Unable To Proceed With the Arbitration Due To Financial Constraints.

As explained in the Lygren Affidavit and the Nilsson Letter, filed in support of Plaintiffs' motion to lift the stay, after the Court's February 2004 Order, Plenteous, through Messrs Lygren and Nilsson, began preparing for the Swedish Arbitration. Among other things, Plenteous began to gather and prepare factual support for the damages-phase Arbitration and conducted a damages analysis to confirm its damages claim. See Lygren Affidavit and Nilsson Letter. Plenteous also started the procedural arrangements to initiate the Arbitration. Id. Although there was no litigation activity in the case before this Court pursuant to this Court's stay of the action, Plenteous was actively preparing for the Swedish Arbitration during much of 2004. Again, all of this is explained in detail in the Lygren Affidavit and the Nilsson Letter, filed with Plaintiffs' motion to lift the stay of this case.

As explained in Plaintiffs' motion to lift the stay, Plenteous does not have the financial resources to proceed with the Swedish Arbitration. See Lygren Affidavit and Nilsson Letter. Because Plenteous does not have the resources to proceed with the Swedish Arbitration and because this case is presently stayed, Plenteous and the other Plaintiffs not involved in the Swedish Arbitration find themselves in a kind of procedural limbo. Plaintiffs therefore request that the Court deny Defendants' motion to dismiss, grant Plaintiffs' motion to lift the stay, and permit the parties to submit to the Court an appropriate plan for' the litigation of this action.

IV. CONCLUSION

For the foregoing reasons, Defendants motion to dismiss this action with prejudice should be denied.

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Dated: February 24, 2005

[END OF APPENDIX TO THE PETITION]

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